2005

Big Sky Finance Company v. Avis and Archibald Title Insurance Agency, Lawyers Title Insurance Corporation, Fireman's Fund Insurance Company, Title Pac, Inc., Jayson Cherry, William A. Avis, Robin Archibald : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS IN AND FOR THE STATE OF UTAH

BIG SKY FINANCE COMPANY, a Utah corporation, Plaintiff/Appellant, vs. AVIS AND ARCHIBALD TITLE INSURANCE AGENCY, limited company, LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation doing business in the State of Utah, FIREMAN'S FUND INSURANCE COMPANY, a California corporation doing business in the State of Utah, TITLE PAC, INC., an Oklahoma company doing business in the State of Utah, JAYSON CHERRY, WILLIAM A. AVIS, and ROBIN ARCHIBALD, Defendants/Appellees.	BRIEF OF APPELLEE LAWYERS TITLE INSURANCE COMPANY Appellate Case No. 20050313 District Court No. 970907313 Appeal from Order of Second District Court Judge W. Brent West

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JURISDICTIONAL STATEMENT

The Utah Supreme Court had original jurisdiction over Big Sky's appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). On April 6, 2005, the Utah Supreme Court transferred this appeal to the Utah Court of Appeals, pursuant to Utah Code Ann. § 78-2-2(4) and Rule 42 of the Utah Rules of Appellate Procedure. This Court has jurisdiction over this appeal pursuant to Utah Code § 78-2a-3(2)(j) (granting jurisdiction over "cases transferred to the Court of Appeals from the Supreme Court").

STATEMENT OF THE ISSUES

ISSUE NO. 1.

The trial court correctly granted summary judgment in favor of Lawyers Title and correctly denied Big Sky's Cross-motion for Summary Judgment because Big Sky's Amended Complaint did not assert any statutory claims or common law claims for vicarious liability against Lawyers Title.

STANDARD OF REVIEW: This Court reviews the district court's determination on summary judgment for correctness. *See, e.g., Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 20, 70 P.3d 1.

ISSUE NO. 2.

The trial court acted well within its discretion under Rule 15(a), Utah Rules of Civil Procedure, to deny the Motion to Amend, because Big Sky's motion was untimely and would have prejudiced Lawyers Title, and also because Big Sky did not have an adequate justification for delay in bringing its claims.

STANDARD OF REVIEW: An abuse of discretion standard applies to a trial court's Rule 15(a) analysis. *Gary Porter Construction v. Fox Construction, Inc.*, 2004 UT App 354, ¶31, 101 P.3d 371.

ISSUE NO. 3.

The trial court also correctly determined on an independent basis under Rule 15(c), Utah Rules of Civil Procedure, that the proposed amendment would have been futile because Big Sky was barred by the statutes of limitation from bringing claims against Lawyers Title for vicarious and statutory liability.

STANDARD OF REVIEW: A correctness standard applies to a trial court's Rule 15(c) analysis. *Gary Porter Construction v. Fox Construction, Inc.*, 2004 UT App 354, ¶31, 101 P.3d 371.

ISSUE NO. 4.

Big Sky has waived its "identity of interest" argument.

STANDARD OF REVIEW:

> '[I]n order to preserve an issue for appeal [,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." [citation omitted] This requirements puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. [citation omitted] For a trial court to be afforded an opportunity to correct the error '(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority." [citation omitted]. Issues that are not raised at trial are usually deemed waived. [citation omitted].

483 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶51, 99 P.3d 801.

STATEMENT OF THE CASE

Nature of the Case/ Course of Proceedings.

Big Sky appeals from an Order entered by Judge W. Brent West of the Second Judicial Court, which granted Lawyers Title's Motion for Summary Judgment, dismissed Lawyers Title as a party from the litigation, and denied Big Sky's Cross Motion for Summary Judgment, Rule 56(f) Motion for Continuance, and Motion to Amend Complaint. (R572-77). The trial court certified this Order as final. (R694-99).

On November 21, 1997, Big Sky filed a Complaint against Avis & Archibald Title Insurance Agency ("Avis & Archibald") and Jayson Cherry for negligence and breach of fiduciary duty stemming from Avis & Archibald's and Mr. Cherry's release of funds held in escrow by Avis & Archibald to Wayne Ogden. (R001-006). Big Sky did not name Lawyers Title as a defendant in the 1997 Complaint.

In October 1999, Big Sky moved for partial summary judgment against Avis and Archibald as to liability. (R046-103). The trial court granted Big Sky's Motion, and determined that Avis & Archibald was liable to Big Sky for release of the escrow funds. (R134-37) In November 1999, Avis & Archibald's counsel withdrew from the litigation. (R138-40).

Two years later, on January 10, 2002, Big Sky moved the trial court for leave to amend its Complaint to add Lawyers Title as a defendant. (R144-58). The trial court

granted Big Sky's motion (R167), and Big Sky served Lawyers Title on March 19, 2002. (R173). Lawyers Title filed its answer on April 10, 2002. (R185-191).

During the next fifteen months, Big Sky conducted no discovery. Except for the May 21, 2002 Answer that Fireman's Fund Insurance Company filed to the Amended Complaint, no further proceedings took place in the case.

On July 23, 2003, Lawyers Title filed its Motion for Summary Judgment. (R204-206). Big Sky opposed Lawyers Title's motion by filing its own Cross-motion for Summary Judgment, claiming that Lawyers Title was liable under Utah Code Ann. Section 31A-23-308, *renumbered* 31A-23a-407 (2003),[1] *the title insurer liability statute*, and under common law agency principles, for Avis & Archibald's release of the escrow funds. (R334-61). In its memorandum, Big Sky asked for leave to amend to assert these claims. (R340-41). Big Sky also requested additional time under Rule 56(f), "if necessary," to obtain discovery to oppose Lawyers Title's motion. (R334-35; 341-42).

After Lawyers Title filed its Reply Memorandum supporting its Summary Judgment Motion, Big Sky filed a motion seeking leave to amend its pleadings to assert its new claims. (R310).

After oral argument, (R720), the trial court granted Lawyers Title's Motion for Summary Judgment, and denied Big Sky's Cross Motion for Summary Judgment, Rule

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[1] This Brief shall refer to this section of the Utah Code as Section 31A-23-308. The statute is reproduced in Appendix E.

56(f) Motion for Continuance, and Motion to Amend Complaint. (R572-77). The trial court has certified this Order as final (R694-99). Big Sky appeals the trial court's Order (R674-78).

Statement of Facts.

1. In April of 1997, Avis & Archibald Title Insurance Agency ("Avis & Archibald"), in an "off again on again" real estate transaction, released funds that it held in behalf of Big Sky to a third party, violating Big Sky's escrow instructions to Avis & Archibald. (R52-53; R135)

BIG SKY'S ORIGINAL 1997 COMPLAINT

2. On November 21, 1997, Big Sky brought suit against Avis & Archibald and its employee Jayson Cherry, alleging causes of action against them for negligence, stemming from Avis & Archibald's release of the escrow funds. (R001-006)

3. Big Sky did not name Lawyers Title as a defendant in the Complaint.

4. On October 22, 1999, Big Sky moved for summary judgment against Avis & Archibald. (R049-57).

5. On January 10, 2000, the trial court executed the Order granting Big Sky's summary judgment. (R134-36)

6. In or about November 2000, Avis & Archibald ceased doing business and its counsel, Robin Nalder, withdrew. (R138-39; R365)

BIG SKY'S REQUEST FOR INFORMATION REGARDING AVIS AND ARCHIBALD'S ERRORS AND OMISSIONS POLICY

7. On April 4, 2001, Big Sky contacted Lawyers Title to request information regarding Avis and Archibald's errors and omissions policy ("E&O Policy") issued by Fireman's Fund Insurance. (R208)

8. Lawyers Title provided the information to Big Sky on April 5, 2001. (R208-09)

9. On April 13, 2001, Big Sky informed Lawyers Title that Big Sky was looking to Fireman's Fund and Avis and Archibald's E&O Policy to satisfy its claim regarding the *Big Sky v. Avis and Archibald* matter (as referenced at the top of the letter). (R224) Big Sky also requested additional information regarding the E&O Policy, which Lawyers Title provided in May 2001 (R224; R208-09)

10. After Big Sky's April 13th letter, it made no other requests to Lawyers Title for information regarding Avis and Archibald's E&O Policy. (R209)

BIG SKY'S 2002 AMENDED COMPLAINT

11. Two years after the trial court had entered judgment for liability against Avis & Archibald, Big Sky obtained leave from the trial court in January 2002 to amend its Complaint to add Lawyers Title for "fraud." (R144-46)

12. Big Sky's only cause of action against Lawyers Title in the Amended Complaint is the Sixth Cause of Action, which states as follows:

15. [Big Sky] has attempted to file a claim under Avis & Archibald's professional liability policy *but has been unable to get the policy or policy number from the Defendant insurance companies.*

. . . .

44. Lawyers Title . . . knew that Defendant Firemen's Fund's agent, Defendant TitlePac, had issued a professional liability insurance policy to Defendant Avis & Archibald that was in full force and effect at the time of [Big Sky's] claim.

45. Lawyers Title . . . ha[s] fraudulently attempted to conceal from [Big Sky] that a professional liability insurance policy exists for Defendant Avis & Archibald to cover [Big Sky's] claim, *which fraud* has damaged [Big Sky] in an amount to be established upon proof at the time of trial.

46. Plaintiff is a third party beneficiary under any and all policies of insurance issued by Lawyers Title, Fireman's Fund and Title Pac, and that [sic] these parties are contractually liable for their insurance liabilities.

(R176; R180-81) (Appendix B).

In the prayer for relief, Big Sky asked:

3. For a finding that Defendants Lawyers' Title, Fireman's Fund and Title Pac is [sic] liable for damages incurred *by their insured* and that they committed a fraud upon Plaintiff in relation to the denial of Plaintiff's claim for damages in relation to the escrowed funds and the unwillingness to produce a policy or policy number for such insurance.

(R182) (emphasis added).

13. Lawyers Title was served with the Amended Complaint on March 19, 2002 and filed its answer on April 10, 2002. (R173-91).

14. Fireman's Fund Insurance Company filed its answer to the Amended Complaint on May 21, 2002.

15. No further proceedings took place for the next fifteen months. Specifically, Big Sky did not undertake any discovery. (Record Index).

LAWYERS' TITLE'S SUMMARY JUDGMENT MOTION

16. On July 23, 2003, Lawyers Title filed its summary judgment motion on the only claim asserted against it, fraudulent nondisclosure. (R207-11)

17. In its supporting memorandum, Lawyers Title noted that the first time Big Sky had contacted Lawyers Title concerning Avis & Archibald's E&O Policy was on April 4, 2001. (R208) Lawyers Title provided evidence that it had provided all of the information that Big Sky requested concerning the E&O Policy, and that after it received that information, Big Sky made no other requests for information. (R208-09)

18. In opposition to Lawyers Title's Motion for Summary Judgment:

a. Big Sky admitted that Lawyers Title had not attempted to fraudulently conceal the existence of the E&O Policy, but had provided Big Sky with all of the information Big Sky had requested regarding Avis & Archibald's E&O Policy. (R335) Big Sky also admitted that the first time it contacted Lawyers Title regarding the E&O Policy was on April 4, 2001. (R335);

b. Big Sky raised new claims and issues to oppose Lawyers Title's Motion and moved for summary judgment on these novel claims. (R720; R572) Specifically, Big Sky sought summary judgment against Lawyers Title under Utah

Code Ann § 31A-23-308, the title insurer liability statute, and under common law agency principles. (R336-40);

c. Near the end of its opposing memorandum, Big Sky asked the trial court for leave to amend. (R340-41) Big Sky's request for leave to amend contained no motion, no mention of Rule 15, and no proposed Amended Complaint. (R340-41)

19. Lawyers Title then filed a consolidated memorandum, which included its final reply supporting its own summary judgment motion, and also opposition to Big Sky's Cross-Motion for Summary Judgment (hereafter "Reply Memorandum"). Lawyers Title provided factual support for and argued that:

a. The facts entitling Lawyers Title to summary judgment were uncontested. (R267);

b. Big Sky had not asserted in its Amended Complaint claims against Lawyers Title under Section 31A-23-308 or under common law agency principles, and that Big Sky was attempting to raise novel claims or theories for recovery in its opposition to Lawyers Title's Motion for Summary Judgment. (R271-73);

c. Utah law expressly precluded a party from amending the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion for summary judgment. (R271-72 (*citing Holmes Dev. LLC v. Cook*, 2002 UT 38, ¶ 31, 48 P.3d 895)).

d. Big Sky's potential claims were time-barred. (R273-74);

e. Lawyers Title had no liability under common law agency principles for Avis & Archibald's release of the funds in escrow, as the agency agreement between Lawyers Title and Avis & Archibald expressly provided that Avis & Archibald was not Lawyers Title's agent for escrow purposes. (R274-77; R283-85; R287; R291 ¶ 6); and finally,

f. Big Sky's cursory request for leave to amend at the end of its opposing memorandum did not rise to the level of a motion for leave to amend and should be denied. (R273 (*quoting Holmes*, 2002 UT 38, at ¶ 59))

BIG SKY'S MOTION TO AMEND ITS AMENDED COMPLAINT.

20. After Lawyers Title had pointed out in its final brief regarding the summary judgment motion that Big Sky's request for leave to amend was ineffectual under the rules, Big Sky then filed a Motion to Amend its Amended Complaint. (R310-11). In its supporting Memorandum, Big Sky did not address Lawyers Title's argument that the new proposed causes of action were time-barred. Big Sky also did not argue that the new claims should or would relate back. (R313-15)

21. Opposing Big Sky's Motion to Amend, Lawyers Title provided factual support for and argued, *inter alia*, that:

a. Big Sky had had all the information necessary to bring its purported claim under Section 31A-23-308 in 1997 (R390-91); Big Sky's purported injury

had occurred more than six years prior (R387); more than one year had passed since Lawyers Title was brought into the litigation and Big Sky had conducted no discovery (R386); and Big Sky was "aware of the new issues raised in [its Second] [A]mended Complaint long before [Big Sky]'s Motion was filed'" (R390 (*quoting Bronson v. Jones*, 2000 UT App 284, 2000 WL 33244137 (Memorandum Decision))

b. Big Sky's delay in bringing its untimely Motion was unjustifiable. (R390-91)

c. Allowing Big Sky leave to amend would unduly prejudice Lawyers Title (R392): Specifically, Big Sky's unjustifiable delay in bringing these new claims had left Lawyers Title without redress, because Avis & Archibald was no longer in business (R392); and, Lawyers Title would be unduly prejudiced by having to prepare a defense to claims stemming from a purported act that had taken place more than six years earlier. (R393)

d. Big Sky's proposed Section 31A-23-308 claim and common law agency claim against Lawyers Title were legally insufficient and futile. (R393-96 (*citing Analdex Res., Inc. v. Meyers*, 871 P.2d 1041, 1046 (Utah Ct. App. 1994))). (R393-96).

22. In its Reply Memorandum supporting its Motion to Amend (R422-34), Big Sky asserted in a single sentence, with no citation to Rule 15(c) of the Utah Rules of Civil

Procedure or any legal authority, that "any amended cause of action relates back to the original filing." (R432)

TRIAL COURT'S ORDER.

23. On July 12, 2004, the trial court issued its Order (Appendix A), in which it:

a. Granted Lawyers Title's Motion for Summary Judgment, finding, *inter alia*, that the undisputed facts showed that Lawyers Title "made no attempt to secret away or fraudulently conceal information concerning the existence of Avis & Archibald's E&O Policy." (R573)

b. Denied Big Sky's Rule 56(f) request on the basis that the supporting affidavit was insufficient. (R574).

c. Denied Big Sky's Cross Motion for Summary Judgment finding that Big Sky, in its Amended Complaint, failed to plead causes of action against Lawyers Title under Section 31A-23-308, or under "an agency theory." (R574-75)

d. Denied Big Sky's Motion to Amend. The trial court's ruling in this regard was as follows:

> Having reviewed the requisite three factors for determining the merits of Big Sky's Motion to Amend, specifically, Big Sky's timeliness in bringing its Motion; Big Sky's justification for delay; and any resulting prejudice to LTIC if the Court should grant Big Sky's Motion, the Court issues the following Findings of Fact and Conclusions of Law:

A. Timeliness: The Court concludes that Big Sky's Motion to Amend is untimely. Big Sky had a potential statutory cause of action against LTIC under Utah Code Ann. § 31A-23-308, renumbered as Utah Code Ann. § 31A-23-407, from the onset of the present litigation. However, Big Sky elected not to assert that statutory claim until LTIC moved for summary judgment to dismiss the sole claim asserted against it, nearly seven years after filing its initial Complaint. Big Sky's request for leave to amend is untimely.

B. Justification for Delay: The Court acknowledges that Big Sky was involved in an adversary bankruptcy proceeding related to the present matter; however, Big Sky's involvement in that proceeding does not provide adequate justification for Big Sky's delay in seeking leave to amend its Amended Complaint. As stated above, Big Sky had a potential statutory cause of action well before it filed the present Motion to Amend.

The Court concludes that Big Sky has failed to show justification for its untimely Motion.

C. Prejudice: The Court concludes that were it to grant Big Sky's Motion to Amend, doing so would unduly prejudice LTIC, because Big Sky's potential Section [31A-23-308] claim would be barred by the applicable statute of limitations allowing Big Sky to bring a legally futile claim; LTIC would have to prepare a defense to new claims being asserted at this time; although the events leading to these new causes of action occurred nearly seven years ago; and LTIC will likely have difficulty locating witnesses and documents. For these reasons the Court concludes that LTIC would be unduly prejudiced were this Court to grant Big Sky's Motion to Amend.

(R575-76) (Appendix A).

24. On March 31, 2005, ten days after the trial court had certified its July 30, 2004 Order as final (R694-99), Big Sky filed its Notice of Appeal. (R674-78).

SUMMARY OF ARGUMENT

I. BIG SKY'S AMENDED COMPLAINT DID NOT ASSERT ANY STATUTORY CLAIMS OR ANY COMMON LAW CLAIMS FOR VICARIOUS LIABILITY AGAINST LAWYERS TITLE.

No claims against Lawyers Title for statutory or common law vicarious liability claims can be reasonably inferred from the language of the Amended Complaint. Big Sky's objection on appeal is that the trial court did not stretch the language of the pleading to find such allegations against Lawyers Title. In making this argument to this Court, Big Sky has not set forth the pleading requirements for either cause of action. And other than urging that such causes of action can be reasonably inferred from the language, Big Sky has never stated, here or below, how its Amended Complaint adequately met those requirements. As such this Court should decline to address the issue altogether.

If this Court does reach the issue, Big Sky has not met the pleading requirements of Rule 8(a),U.R.Civ.P. The Amended Complaint does not mention any statutory liability and does not contain a single factual assertion that would support liability under Section 31A-23-308. There is no allegation that Avis & Archibald was Lawyers Title's agent – the only relationship between Lawyers Title and Avis & Archibald that is alleged is one of insurer and insured, i.e., that Lawyers Title should pay the damages that Big Sky incurred pursuant to any insurance policy that it may have issued to Avis & Archibald. Lawyers Title never had fair notice of the nature and basis or grounds for a claim under

Section 31A-23-308 or under any agency theory. The trial court correctly found that the Amended Complaint did not include these causes of action.

II. THESE CAUSES OF ACTION EXISTED IN 1997, WHEN BIG SKY COMMENCED THIS LITIGATION.

"A cause of action accrues when 'it becomes remediable in the courts, that is when the claim is in such condition that the courts can proceed and give judgment if the claim is established.'" *Dept of Natural Resources v. Huntington-Cleveland Irr. Co.,* 52 P.3d 1257, 1264 (Utah 2002) (citation omitted). Big Sky's statutory and vicarious liability causes of action existed in 1997, when this action was commenced.

Big Sky's argument that it did not have claims against Lawyers Title until its damages were certain relies on events that occurred *after* the original complaint was filed. Accordingly, the trial court correctly determined that Big Sky's allegations of vicarious and statutory liability against Lawyers Title existed at the inception of this litigation in 1997.

III. THE TRIAL COURT HAD SEVERAL INDEPENDENT BASES ON WHICH EXERCISED ITS BROAD DISCRETION TO DENY BIG SKY'S UNTIMELY MOTION TO AMEND.

The decision whether to grant or deny leave to amend a pleading pursuant to Rule 15(a) is within the broad discretion of the trial court. Trial courts consider the three well-established factors in making such a determination: Timeliness, justification, and prejudice. A court's ruling can be predicated on only one or two of the factors.

Here, the trial court denied Big Sky's motion to amend on each of these three bases, and made specific findings regarding each of these factors. The trial court's finding on any one of those factors is sufficient alone to justify its ruling. The trial court acted well within its discretion in denying Big Sky's Motion.

IV. THE TRIAL COURT ALSO PROPERLY DENIED THE MOTION TO AMEND BECAUSE BIG SKY'S CLAIMS FOR VICARIOUS AND STATUTORY LIABILITY ARE BARRED BY THE STATUTE OF LIMITATIONS.

The trial court also addressed another independent factor in denying Big Sky's Motion to Amend, i.e., that Big Sky's attempts to assert its new allegations against Lawyers Title were futile. Because Big Sky's potential causes of action against Lawyers Title existed in 1997, the claims were barred by the applicable statutes of limitations.

V. BIG SKY CANNOT SAVE ITS CLAIMS BY ARGUING THAT THEY SHOULD HAVE RELATED BACK.

A. BIG SKY DID NOT PRESERVE THIS ARGUMENT BELOW.

Big Sky's "argument" to the trial court on this issue was raised in its Reply Memorandum supporting its Motion to Amend, and was comprised of a single sentence, with no citation to Rule 15(c), U.R.Civ.P. or any other legal authority, and no analysis of any sort at all. Accordingly, this Court should deem Big Sky's argument waived.

B. BIG SKY'S "IDENTITY OF INTEREST" ARGUMENT HAS BEEN RAISED FOR THE FIRST TIME ON APPEAL.

Failing to brief the issue below, Big Sky asserts for the first time on appeal that Avis & Archibald and Lawyers Title allegedly share an "identity of interest." This Court should decline to consider this argument. Big Sky has not argued "plain error or exceptional circumstances" in its opening Brief, as required by the Court to consider this new argument.

C. BIG SKY CANNOT DEMONSTRATE ANY "IDENTITY OF INTEREST" BETWEEN AVIS & ARCHIBALD AND LAWYERS TITLE SUFFICIENT FOR THE CLAIMS TO HAVE RELATED BACK.

Even if this Court were to reach the issue, Big Sky's relation-back argument fails. For an identity of interest to exist under Utah law, the two parties must share the "same legal interest," meaning the legal position and defenses of the two parties must be the same.

Big Sky argues only that there is an identity of interest because Lawyers Title knew about the complaint against Avis & Archibald before it was made a party to the litigation and that Lawyers Title would not be "prejudiced" by the relation back. Assuming arguendo that Lawyers Title did know about the complaint, this is not enough to meet the requirements to show an identity of interest. Lawyers Title does not share the same legal interests as Avis & Archibald in the outcome of the litigation, and a disposition as to one would not necessarily affect the claims or defenses available to the

other. Lawyers Title had defenses not available to Avis & Archibald, and vice versa. Thus, no identity of interest exists between Avis & Archibald and Lawyers Title.

ARGUMENT

I. BIG SKY'S AMENDED COMPLAINT DID NOT ASSERT ANY STATUTORY CLAIMS OR ANY COMMON LAW CLAIMS FOR VICARIOUS LIABILITY AGAINST LAWYERS TITLE.

Big Sky argues that its Amended Complaint includes statutory or other common law vicarious liability claims against Lawyers Title (Appellant's Brief, p. 33-37). But no such claims can be reasonably inferred from the language of the Amended Complaint. Big Sky's only cause of action against Lawyers Title in the Amended Complaint is the Sixth Cause of Action, which states as follows:

> 15. [Big Sky] has attempted to file a claim under Avis & Archibald's professional liability policy *but has been unable to get the policy or policy number from the Defendant insurance companies.*
>
> . . . .
>
> 44. Lawyers Title . . . knew that Defendant Firemen's Fund's agent, Defendant TitlePac, had issued a professional liability insurance policy to Defendant Avis & Archibald that was in full force and effect at the time of [Big Sky's] claim.
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> 45. Lawyers Title . . . ha[s] fraudulently attempted to conceal from [Big Sky] that a professional liability insurance policy exists for Defendant Avis & Archibald to cover [Big Sky's] claim, *which fraud* has damaged [Big Sky] in an amount to be established upon proof at the time of trial.
>
> 46. Plaintiff is a third party beneficiary under any and all policies of insurance issued by Lawyers Title, Fireman's Fund and Title Pac, and that [sic] these parties are contractually liable for their insurance liabilities.

(R176; R180-81) (Appendix B).

In the prayer for relief, Big Sky asked:

> 3. For a finding that Defendants Lawyers Title, Fireman's Fund and Title Pac is [sic] liable for damages incurred *by their insured* and that they committed a fraud upon Plaintiff in relation to the denial of Plaintiff's claim for damages in relation to the escrowed funds and the unwillingness to produce a policy or policy number for such insurance.

(R182) (emphasis added) (Appendix B).

This language does state a claim against Lawyers Title for fraudulent concealment, which the trial court dismissed because the undisputed facts showed that Lawyers Title made no attempt to conceal information from Big Sky. (R573). Big Sky makes no argument on appeal that the trial court erred in dismissing this claim. The language also states a claim that Lawyers Title is liable for damages caused by "their insured" pursuant to any insurance policy it may have issued to Avis & Archibald. Big Sky never proffered any evidence that Lawyers Title had, in fact, issued an insurance policy to Avis & Archibald. Instead, Big Sky asked for a Rule 56(f) continuance (R341-42), which the trial court denied because the supporting Rule 56(e) affidavit lacked foundation and specificity. (R574). Big Sky does not challenge this decision on appeal, either.[2]

Big Sky's objection on appeal is that the trial court did not stretch the language of the pleading to find an allegation that Lawyers Title had statutory liability under Section 31A-23-308 or common law vicarious liability for Avis & Archibald's negligence. In

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[2] The evidence below was that Lawyers Title is a title insurer only, and that it does not issue professional liability policies to anyone in the State of Utah, including Avis & Archibald. (R268-69; 284).

making this argument to this Court, Big Sky has not set forth the pleading requirements for either cause of action. And other than urging that such causes of action can be reasonably inferred from the language, Big Sky has never stated, here or below, how its Amended Complaint adequately met those requirements. As such this Court should decline to address the issue altogether. *See, Kuhre v. Goodfellow*, 2003 UT App. 85, ¶¶ 13-16, 69 P.2d 286, 290 (Utah App. 2003) (declining to address whether trial court erred in dismissing claims when pleader failed to set forth pleading requirements and failed to state how their second amended complaint adequately met those requirements).

If this Court does reach the issue, Rule 8(a) of the Utah Rules of Civil Procedure governs Utah's pleading requirements. The rule requires, *inter alia*, that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Utah R. Civ. P. 8(a). Longstanding Utah case law has interpreted Rule 8 to require that the complainant "give the opposing party fair notice of the nature and basis or grounds of the claim." *Blackham v. Snelgrove*, 3 Utah 2d 157, 160, 280 P.2d 453, 455 (1955). Because the trial court granted Lawyers Title's Motion for Summary Judgment and denied Big Sky's Cross-motion for Summary Judgment, this Court reviews the district court's determination for correctness. *See Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 20, 70 P.3d 1.

Ellis v. Hale, 373 P.2d 382, 386 (Utah 1962), is illustrative of the fair notice concept. There, the Utah Supreme Court upheld the dismissal of a complaint that had

asserted that a title insurance contract had been breached, stating that "the particular provision or provisions claimed to have been breached are not set out in the complaint. This claim does not meet the requirements of our rules and was properly dismissed." *Id.*

Here, the Amended Complaint is devoid of any mention of or reference to *any* statutory liability on Lawyers Title's part, much less any specific mention to Section 31A-23-308. Nor is there a single factual assertion that would support any liability under Section 31A-23-308. There is no allegation that Avis & Archibald was Lawyers Title's agent – the only relationship between Lawyers Title and Avis & Archibald that is alleged in the Amended Complaint is in paragraph 46 and the prayer for relief – there, Big Sky averred that the relationship was one of insurer and insured, i.e., that Lawyers Title should pay the damages that Big Sky incurred pursuant to any insurance policy that it may have issued to Avis & Archibald. (R176, par. 46; 181-82, par. 3). And the only mention of insurance in the Amended Complaint in reference to Lawyers Title was that Avis & Archibald allegedly was the "insured" under a liability policy that Lawyers Title had presumably issued. (R181-82).

Big Sky wanted the trial court to do more than "fill in the blanks," as was allowed in *Cheney v. Rucker*, 14 Utah 2d 205, 381 P.2d 86, 91 (Utah 1963). Big Sky wanted the trial court to charge Lawyers Title, because it is an insurance company, with any cause of action that Big Sky might possibly have that could be related to any kind of insurance in which Lawyers Title might be involved. While pleadings should be liberally construed, a

litigant cannot be charged with notice of any claim that might be brought against it based upon the nature of its business. Lawyers Title never had "fair notice of the nature and basis or grounds" for a claim under Section 31A-23-308 or under any agency theory. *Blackham*, 280 P.2d at 455. The trial court correctly found that the Amended Complaint did not include these causes of action.

II. THESE CAUSES OF ACTION EXISTED IN 1997, WHEN BIG SKY COMMENCED THIS LITIGATION.

"A cause of action accrues when 'it becomes remediable in the courts, that is when the claim is in such condition that the courts can proceed and give judgment if the claim is established.'" *Dept of Natural Resources v. Huntington-Cleveland Irr. Co.,* 2002 UT at ¶24, 52 P.3d at 1264 (citation omitted), cited by Big Sky at p. 19 of its Brief. Big Sky's statutory and vicarious liability causes of action existed in 1997, when this action was commenced.

STATUTORY CLAIM. Under Section 31A-23-308, a title insurer is "directly and primarily liable" for the disbursement of funds held in escrow by its agent who has issued the title insurer's commitment or a policy of insurance in connection with the transaction. Big Sky's own pleadings demonstrate that every element necessary for proof of Lawyers Title's alleged liability under this statute existed in 1997. In its original Complaint, Big Sky alleged that Avis & Archibald had negligently disbursed funds held in escrow. (R001-006) Big Sky alleged that it had been damaged by Avis & Archibald's negligent

disbursement of $396,000.00 of escrow funds. (R001-006) Big Sky asked for punitive damages in the amount of $500,000.00, and alleged that it had incurred damages in the form of attorney fees due to Avis & Archibald's negligent disbursement of the funds. (R001-006). The commitment for title insurance which Big Sky alleges was issued in connection with the transaction has an effective date of November 1996. (R345). Big Sky repeatedly argued to the trial court that pursuant to the statute, Lawyers Title was "strictly liable" for Avis & Archibald's mishandling of the escrow funds. (R425; R720 pp.5-6). In its memoranda submitted in support of its summary judgment motion on this (unpleaded) claim, Big Sky set out these very elements, never once mentioning the date in 2002 that it claims its damages were fixed. (R334-342). Thus, Big Sky itself recognizes that the 2002 date is simply not an element of liability under the statute.

In sum, "all of the elements of [Section 31A-23-308] creating liability exist[ed] or may [have] be[en] established" in November 1997. *Huntington-Cleveland Irrigation Co.*, 2002 UT 75 at ¶ 24.

VICARIOUS LIABILITY. Any vicarious liability claim that Big Sky may have had against Lawyers Title also existed in November 1997. Lawyers Title would be vicariously liable for Avis & Archibald's wrongful disbursement of escrowed funds only there was an actual or apparent agency relationship between them with respect to Avis & Archibald's escrow activities. *Bodell Const. Co. v. Stewart Title Guar. Co.*, 945 P.2d 119, 124-25 (Utah Ct. App. 1997). That relationship would have had to have existed at

the time that Avis & Archibald negligently disbursed the $396,000.00 held by it in escrow. *See Glover v. Boy Scouts of America*, 923 P.2d 1383, 1385 (Utah 1996) (no vicarious liability can exist if the agent was not acting within the scope of his agency at the time the tort occurred). Thus, all of the elements necessary to allege vicarious liability existed at the time Avis & Archibald negligently disbursed the funds, and Big Sky could have brought a claim against Lawyers Title for vicarious liability at the same time it sued Avis & Archibald in 1997.

Big Sky's argument that it did not have claims against Lawyers Title until its damages were certain relies on events that occurred *after* the original complaint was filed. As Big Sky notes, Wayne Ogden paid part of the funds back after Big Sky filed its original complaint, and then Big Sky was required to repay those funds to Ogden's bankruptcy trustee. (Appellant's Brief, p. 6). As a result of these events, Big Sky was not made whole. But at the time the original complaint was filed, its damage was in "such condition that the court[could] proceed and give judgment if the claim is established.'" *Huntington-Cleveland Irr. Co.,* 2002 UT 75 at ¶24; 52 P.3d at 1264. Even Big Sky's counsel recognized at the motion hearing, "The facts are consistent. The facts have always been the same right from the start. Jayson Cherry and Avis & Archibald mishandled escrow funds." (R720, p.6) Accordingly, the trial court correctly determined that Big Sky's allegations of vicarious and statutory liability against Lawyers Title existed at the inception of this litigation in 1997.

III. THE TRIAL COURT HAD SEVERAL INDEPENDENT BASES ON WHICH EXERCISED ITS BROAD DISCRETION TO DENY BIG SKY'S UNTIMELY MOTION TO AMEND.

Its Amended Complaint failing to include claims against Lawyers Title for vicarious or statutory liability, Big Sky argues that the trial court erroneously denied leave to amend to include those claims. A litigant may ask for leave to amend his pleading pursuant to Rule 15(a). *See* Utah R.Civ.P. 15 "'The granting or denial of leave to amend a pleading is within the broad discretion of the trial court, and [appellate courts] will not disturb absent a showing of an abuse of discretion.'" *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44,¶ 41, 87 P.3d 734 (*quoting Smith v. Grand Canyon Expeditions,* 2003 UT 57,¶ 31, 84 P.3d 1154). This Court has explained that "[t]rial courts are in a much better position than appellate courts to make such case-specific determinations as whether too much time has passed to fairly allow an amendment, whether a party's delay is the result of an unfair tactic or dilatory motive, or whether some other unforeseen factor militates for or against a particular result in that particular case." *Id.*

In analyzing a motion to amend, this Court has stated that a trial court is "well-advised" to consider the following three well-established factors in determining whether to grant or deny a motion to amend: Timeliness, justification, and prejudice. *Id.* at ¶ 39. Further, the "circumstances of a particular case may be such that a court's ruling on a motion to amend can be predicated on only one or two of the particular factors." *Id.* at ¶ 42 (*citing First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133

(10th Cir. 1987) ("We hold that a district court acts within its discretion when it denies leave to amend for 'untimeliness' or 'undue delay.' Prejudice to the opposing party need not be shown also")). Here, the trial court denied Big Sky's motion to amend on each of these three bases. (R575).[3]

In its ruling on the timeliness factor, the trial court stated:

> Timeliness: The Court concludes that Big Sky's Motion to Amend is untimely. Big Sky had a potential statutory cause of action against LTIC under Utah Code Ann. § 31A-23-308, renumbered as Utah Code Ann. § 31A-23a-407, from the onset of the present litigation. However, Big Sky elected not to assert that statutory claim until LTIC moved for summary judgment to dismiss the sole claim asserted against it, nearly seven years after filing its initial Complaint. Big Sky's request for leave to amend is untimely.

(R 575)(Appendix A). Big Sky's motion to amend had come at the eleventh hour, some seven years into the case, fifteen (15) months after Lawyers Title had been dragged in, seven months after the default discovery termination date required by Rule 26(d) of the Utah Rules of Civil Procedure, and after completion of briefing on Lawyers Title's

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[3] Big Sky incorrectly asserts on pp. 24-25 of its Brief that the trial court relied on *Holmes Dev., LLC v. Cook*, 2002 UT 38, 48 P.3d 895 (Utah 2002) to deny the Motion for Leave to Amend. Lawyers Title had cited to *Holmes* in support of its own summary judgment motion, noting that a litigant cannot oppose summary judgment by raising previously unpleaded claims or theories for recovery. (R271). Big Sky's unpleaded theories that it sought to bring through its subsequent Motion to Amend did not state claims that would affect the fraud claim that the trial court dismissed on summary judgment. The trial court properly ignored those unpleaded theories pursuant to *Holmes* in granting Lawyers Title's Motion for Summary Judgment and dismissing the fraud claim. Big Sky has not argued on appeal that the trial court erroneously dismissed the fraud claim. *Holmes* is of no consequence on appeal because the trial court did not rely on it to deny the Motion to Amend.

motion for summary judgment requesting the trial court to dismiss Big Sky's frivolous claim.

When analyzing the timeliness factor, this Court has indicated that "regardless of the procedural posture of the case, *motions to amend have typically been deemed untimely when they were filed several years into the litigation*." *Kelly*, 2004 UT App at ¶ 30 (emphasis added) (*citing,* among others, *Kleinert v. Kimball Elevator Co.,* 854 P.2d 1025, 1025 (Utah Ct. App. 1993) (upholding denial of motion to amend where the motion was filed three years after the commencement of the suit and eight years after the original injury); *Hill v. State Farm Mut. Auto. Ins. Co.*, 829 P.2d 142, 149 (Utah Ct. App. 1992) (upholding denial of motion to amend where the motion was filed six years after filing of the original suit)). "In such cases, the ongoing passage of time makes it increasingly difficult for the nonmoving party to effectively respond to the new allegations or claims. Parties in such circumstances are often hindered by witnesses who have since moved or died, by their shaky memories and recollections, or by documents which have since been lost or destroyed." *Kelly*, 2004 UT App at ¶ 30.

The timeliness factor weighs into the prejudice factor, which the trial court here also recognized:

> Prejudice: The Court concludes that were it to grant Big Sky's Motion to Amend, doing so would unduly prejudice LTIC, because Big Sky's potential Section [31A-23-308] claim would be barred by the applicable statute of limitations allowing Big Sky to bring a legally futile claim; LTIC would have to prepare a defense to new claims being asserted at this time; although the events leading to these new causes of action

> occurred nearly seven years ago; and LTIC will likely have difficulty locating witnesses and documents.

(R 575) (Appendix A).[4] In the case at bar, regardless of whether the statute of limitations had run (*see arguments, infra* at Points IV and V), the difficulty in locating witnesses and documents seven years after the transaction and long after Avis & Archibald had ceased doing business – that difficulty alone justifies the trial court's refusal to grant Big Sky leave to amend its complaint. *Kelly*, 2002 UT App. 44 at ¶42.

The trial court also found that Big Sky had failed to justify its delay in bringing the claims.

> Justification for Delay: The Court acknowledges that Big Sky was involved in an adversary bankruptcy proceeding related to the present matter; however, Big Sky's involvement in that proceeding does not provide adequate justification for Big Sky's delay in seeking leave to amend its Amended Complaint. As stated above, Big Sky had a potential statutory cause of action well before it filed the present Motion to Amend.
>
> The Court concludes that Big Sky has failed to show justification for its untimely Motion.

(R575) (Appendix A).[5] In addressing the justification prong, this Court has indicated that the "analytic thrust" should be the reasons offered by the moving party for not including the facts or allegations in the original complaint. *Kelly,* 2002 UT App. 44 at ¶ 38. "Forexample, in cases where the party knew of the events or claims earlier yet failed to

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[4] This finding directly contradicts Big Sky's claim on p. 27 of its Brief that the trial court had made no finding that the ongoing passage of time would make it difficult for Lawyers Title to effectively respond to any new claims brought against it.

[5] This finding directly contradicts the argument at pps. 27-28 of Big Sky's Brief that the trial court did not find that Big Sky's delay was unjustified.

plead them due to a dilatory motive, bad faith effort during the pleading process, or unreasonable neglect in terms of pleading preparation, it would follow that the motion to amend could be denied on that basis." *Id.* In the instant case, where all of the elements for bringing the alleged claims against Lawyers Title existed in 1997, the bankruptcy proceeding did not prevent Big Sky from seeking to amend its complaint long before 2002. Big Sky told the trial court that had the bankruptcy proceedings gone differently, and Big Sky been able to retain the funds, it still would have asserted damages against Lawyers Title.

> [T]he Plaintiff had hoped that the appeal [to the Tenth Circuit] would be successful thereby significantly reducing any potential claim which Plaintiff may have against Avis & Archibald or its insurance companies.

(R426). *See, also* R720, p.5 ("Could be that Big Sky would come back and say, all we have here's defense costs perhaps"). Yet the only excuse Big Sky ever offered for the lengthy delay was the bankruptcy proceeding. As the trial court noted, "I have the sense that everybody thought this was gonna be handled, and then when Avis & Archibald went out of business and filed bankruptcy, [Big Sky] had to scramble to find where the deep pockets might be. . . ." (R720, pp. 23-24). The trial court acted well within its discretion in finding that Big Sky had failed to proffer an adequate justification for its delay. This finding is also sufficient on its own to uphold the trial court's denial of Big Sky's Motion to Amend.

IV. THE TRIAL COURT ALSO PROPERLY DENIED THE MOTION TO AMEND BECAUSE BIG SKY'S CLAIMS FOR VICARIOUS AND STATUTORY LIABILITY ARE BARRED BY THE STATUTE OF LIMITATIONS.

Each of the trial court's findings on the three factors analyzed above is alone sufficient without further analysis to uphold its denial of Big Sky's motion to amend. Nevertheless, the trial court also addressed another factor, i.e., that Big Sky's attempts to assert its new allegations against Lawyers Title were futile. Trial courts properly deny motions to amend "when the moving party seeks to assert a legally insufficient or futile claim." *Andalex Res., Inc. v. Meyers,* 871 P.2d 1041, 1046 (Utah Ct. App. 1994). When a claim is barred by the applicable statute of limitations, then there is no point to amending a complaint to include it. The effort is futile. *See Jensen v. IHC Hosps., Inc.,* 2003 UT 51, ¶139, 82 P.3d 1076 (court may deny motion to amend as futile if proposed amendment would not withstand a motion to dismiss).

Analyzing this factor, the trial court correctly concluded that Big Sky had a potential claims against Lawyers Title from the "get-go." (R720 p.23) The trial court also correctly concluded that Big Sky's potential claim under Section 31A-23-308 was a "statutory remedy," unlike "suing the owner of [a] car and deciding whether or not to name the insurance company or not. *"From the get-go, [Big Sky] had a statutory cause of action . . . against the insurance companies and they could have been sued directly at any time right out of the chute because that statute exists."* (R720 p. 23 (emphasis

added)) In sum, the trial court correctly concluded, as reflected in its Order (R572-76) and the hearing transcript (R720), that Big Sky had these same potential causes of action against Lawyers Title in 1997. *See, also,* Point II *supra.*

Big Sky's statutory claim is governed by the three-year statute of limitations found in Utah Code Ann. Section 78-12-26(4) ("[a]n action may be brought within three years: . . . (4) for a liability by the statutes of this State"). (R393). Its common law claim is governed by the four-year statute of limitations found in Utah Code Ann. Section 78-12-25(3). Accordingly, both of the claims that Big Sky sought to assert against Lawyers Title were barred by the applicable statutes of limitations.

V. BIG SKY CANNOT SAVE ITS CLAIMS BY ARGUING THAT THEY SHOULD HAVE RELATED BACK.

A. BIG SKY DID NOT PRESERVE THIS ARGUMENT BELOW.

Big Sky seeks to avoid the statute of limitations by claiming that Rule 15(c) would allow its proposed claims against Lawyers Title to relate back to the filing of the 1997 Complaint against Avis & Archibald. Big Sky protests that its "relation back arguments were ignored" by the trial court. (Appellant's Brief, p. 20). Big Sky's "arguments" to the trial court on this issue were comprised of a single sentence in its Reply Memorandum filed in support of its Motion to Amend. Big Sky simply asserted in conclusory fashion that "any amended cause of action relates back to the original filing." (R432) (Appendix D). Raised for the first time in Big Sky's reply pleadings, the issue was correctly ignored by the trial court.

> It is the responsibility of the moving party to raise in its ... motion all of the issues on which it believes it is entitled to [prevail]. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief

State v. Phathammavong, 860 P.2d 1001, 1004 (Utah App. 1993).

Moreover, Big Sky did not analyze the issue at all – it did not cite to Rule 15(c) of the Utah Rules of Civil Procedure, or to any other legal authority, but stated only that the claims should relate back. (R432). At the motion hearing, Big Sky's counsel even admitted that he had not taken time to brief the statute of limitations issue (R720, p. 16).

> '[I]n order to preserve an issue for appeal [,] the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." [citation omitted] This requirements puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding. [citation omitted] For a trial court to be afforded an opportunity to correct the error '(1) the issue must be raised in a timely fashion[,] (2) the issue must be specifically raised[,] and (3) the challenging party must introduce supporting evidence or relevant legal authority." [citation omitted]. Issues that are not raised at trial are usually deemed waived. [citation omitted].

483 Main Street v. Easy Heat, Inc., 2004 UT 72, ¶51, 99 P.3d 801. Merely mentioning the issue in the pleadings is not enough. *LeBaron & Assoc., Inc. v. Rebel Enterprises, Inc.*, 823 P.2d 479, 483 (Utah App. 1991). Accordingly, this Court should deem Big Sky's argument waived.

B. BIG SKY'S "IDENTITY OF INTEREST" ARGUMENT HAS BEEN RAISED FOR THE FIRST TIME ON APPEAL.

Failing to brief the issue below, Big Sky asserts for the first time on appeal that Avis & Archibald and Lawyers Title allegedly share an "identity of interest." This Court should decline to consider this argument. *See Tindley v. Salt Lake City Sch. Dist.*, 2005 UT 30,¶ 10, fn.2, 116 P.3d 295 (declining to address issues first raised on appeal by appellant). Big Sky has not argued "plain error or exceptional circumstances" in its opening Brief, as required by the Court to consider this new argument, further reaffirming that this Court should decline to address Big Sky's argument. Rule 24(a)(5)(B), Utah Rules of Appellate Procedure; *In re D.S.*, 2003 UT App 108,¶ 1, 2003 WL 21290704 (Memorandum Decision).

C. BIG SKY CANNOT DEMONSTRATE ANY "IDENTITY OF INTEREST" BETWEEN AVIS & ARCHIBALD AND LAWYERS TITLE SUFFICIENT FOR THE CLAIMS TO HAVE RELATED BACK.

Even if this Court were to reach the issue, Big Sky's relation-back argument fails. Big Sky cites to *Gary Porter Constr. v. Fox Constr.*, 2004 UT App. 354, 101 P.3d 371, and urges that Lawyers Title has an "identity of interest" with Avis & Archibald because it knew about the litigation and was unofficially involved before it was made a party. Appellant's Brief, pp. 20-23. Under Utah law, however, an identity of interest does not exist "whenever an unnamed party happen[s] to know about the filing of a complaint." *Penrose v. Ross*, 2003 UT App 157, ¶ 20, 71 P.3d 631. For an identity of interest to exist,

parties must also share the "same legal interest," meaning the legal position and defenses of the two parties must be the same. *Id.* at ¶19.

In *Gary Porter,* a subcontractor had sued the general contractor, but waited until after the statute of limitations had run to amend the complaint to name the general contractor's surety. *Gary Porter,* 2004 UT App 354 at ¶6. The trial court granted summary judgment to the surety on its statute of limitations defense, finding that the amended complaint did not relate back to the original filing. *See id.* at ¶8. This Court reversed and remanded the case to the trial court to make a determination as to whether the surety had had notice of the original complaint. *See id.* at ¶45. There was no need in *Gary Porter* to discuss or analyze whether the general contractor and the surety shared the same legal interest, because under Utah law, a principal and surety share an identity of interest in the indemnity context. *Penrose*, 2003 UT App 157 at ¶16, fn.4 (*citing James Constr., Inc. v. Salt Lake City Corp.,* 888 P.2d 665, 669 (Utah Ct. App. 1994)). Disposition of the claim against one would dispose of the claim against the other.

In contrast, in *Penrose*, the parties' interests were not the same. There, a son was involved in an accident while driving his father's car. *See Penrose,* 2003 UT App. 157 at ¶¶ 2-4. Days before the statute of limitations had run, the plaintiff sued the father for negligence, alleging that the father was driving the car. *See id.* at ¶ 2. After the statute of limitations had run, the plaintiff filed an amended complaint naming the son as the driver, and alleging a claim for negligence against him. *See id.* at ¶ 3. Both father and son

moved for summary judgment. The son argued the statute of limitations had run on the negligence claim asserted against him. *See id.* at ¶ 5. The trial court granted both motions, and found that no "identity of interest" existed between the father and son to relate the claim against the son back to the timely filed complaint against the father. *See id.* at ¶ 6. On appeal, the plaintiff argued that an identity of interest exists when "the real party is alerted to the proceedings so as to avoid prejudice." *See id.* at ¶ 10. The plaintiff urged that it

> was reasonable to assume that father told [son] he was served with a complaint asserting damages resulting from the accident involving [son] because (1) father was served at the same residence as [son], (2) father knew [son] was driving his car and was in an accident, (3) father knew he was not the driver involved in the accident, (4) [son] was insured by father's insurance policy, and (5) father and [son] had the same attorney.

Id. at ¶ 10. The plaintiff argued that because son had notice of the lawsuit, he would not be prejudiced by being brought in as a defendant after the statute of limitations had run on the negligence claim.

This Court affirmed the trial court's ruling finding no identity of interest, explaining that mere knowledge of a complaint being filed was not enough to establish an identity of interest for relation back purposes. *See id.* at ¶¶ 1, 20. The new and old party must have the same legal interest in the case. *See id.* at ¶ 19.

> [H]ad Penrose's Original Complaint properly named the parties, a disposition of the case against Father would not affect a determination as to Ross [son] because the two parties do not have the *same* legal interest in the outcome of the case. Father's defense is that he was not negligent or liable

> because he was nt the driver. On the other hand, Ross's affirmative defense focuses on the running of the statute of limitations. Even if the claim had been properly filed, Ross's defense would be that he did not act negligently. A disposition as to either party does not affect the claims or defenses available to the other party. Thus, where they do not have the "same" legal interest, there is no identity of interest.

Id. (emphasis in original).

The fact that the two defendants were father and son, both with knowledge of the complaint, was simply not enough. Further, the Court rejected the plaintiff's argument that a showing of no "prejudice" to the unnamed party based upon prior knowledge of the complaint was enough to establish an identity of interest, because, as the Court explained, the exception to Rule 15(c) would "swallow the rule and allow relation back whenever an unnamed party happened to know about the filing of a complaint." *Id.* at ¶ 20; *cf., Russell v. Standard Corp.*, 898 P.2d 263 (Utah 1995) (focusing on the relationship between the parties in upholding the trial court's finding that the amendment did not relate back).

Big Sky argues only that there is an identity of interest because Lawyers Title knew about the complaint against Avis & Archibald before it was made a party to the litigation and that Lawyers Title would not be "prejudiced" by the relation back. (Appellant's Brief at 22-23). Assuming arguendo that Lawyers Title did know about the complaint, this is not enough to meet the *Penrose* requirements. Similar to *Penrose*, Lawyers Title does not share the same legal interests as Avis & Archibald in the outcome of the litigation, and "a disposition as to either does not affect the claims or defenses

available to the other party." *Penrose,* 2003 UT App. 157 at ¶ 19. Lawyers Title was not Avis & Archibald's errors and omissions insurance carrier, meaning it was not indemnifying Avis & Archibald. Therefore a judgment against Avis & Archibald was not necessarily a judgment against Lawyers Title. If the elements of Section 31A-23-308 are proven, a title underwriter's liability is "direct and primary." Based on this language, Big Sky itself argued that Lawyers Title's potential liability under the statute is "strict" (R425; R720 pp.5-6). Under Utah law, proof of liability under a strict liability statute does not require a finding of negligence. *See, e.g., Sharp v. Williams,* 915 P.2d 495 (Utah 1996) (holding that it is unnecessary for injured party to allege and prove negligence under statute imposing strict liability on owner of dog). Any potential liability on the part of Lawyers Title, statutory or common law, would be dependent upon facts that had no relevance to Big Sky's negligence claim against Avis & Archibald. For example, Big Sky would be required to prove that Lawyers Title had an agency relationship sufficient to establish common law vicarious liability. Big Sky would have to prove that any commitment or policy of title insurance that was issued had in fact been issued in connection with the transaction whereby Big Sky was harmed. Lawyers Title's defenses would also include an argument that Section 31A-23-308 is unconstitutional,[6] and that Avis & Archibald was not Lawyers Title's agent for escrow purposes. And like the son

[6] Judge J. Dennis Frederick of the Third District Court of the State of Utah, Salt Lake County, recently ruled that U.C.A. Section 31A-23-308 violates Article I, Section 24 of the Utah Constitution. (See Appendix F hereto, p. 6)

in *Penrose*, Lawyers Title also had a statute of limitations defense that was not available to the original party to the complaint (father in *Penrose*, Avis & Archibald in the case at bar). *See Penrose,* 2003 UT App. 157 at ¶19.

Avis & Archibald had none of these defenses. Instead, its primary defense was that it was not negligent in releasing the escrow funds. (R016-24) Thus, "disposition of the case against [Lawyers Title] would not affect a determination as to [Avis & Archibald] because the parties do not have the same legal interest in the outcome of the case." *Penrose*, 2003 UT App 157 at ¶ 19. In sum, no identity of interest exists between Avis & Archibald and Lawyers Title.

Thus, the trial court correctly determined that Big Sky's potential claims under Section 31A-23-308 and under common law agency principles were time-barred and patently untimely. Big Sky cursory's relation-back arguments fail.

CONCLUSION

For the foregoing reasons, Lawyers Title respectfully requests that the Court affirm the decisions of the trial court that denied Big Sky's Motion to Amend and granted Lawyers Title's Motion for Summary Judgment. Additionally, Lawyers Title respectfully requests that this Court rule upon Lawyers Title's claim for attorneys fees and costs on appeal, which issue the Court deferred in its Order on Lawyers Title's Motion for Summary Disposition.

DATED this 5th day of December, 2005.

COHNE, RAPPAPORT & SEGAL P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 5th day of December, 2005, to:

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Tab A

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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY

STATE OF UTAH

BIG SKY FINANCE COMPANY, a Utah corporation, Plaintiff, vs. AVIS AND ARCHIBALD TITLE INSURANCE AGENCY, limited company, LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation doing business in the State of Utah, FIREMAN'S FUND INSURANCE COMPANY, a California corporation doing business in the State of Utah, TITLE PAC, INC., an Oklahoma company doing business in the State of Utah, JAYSON CHERRY, WILLIAM A. AVIS, and ROBIN ARCHIBALD, Defendants.	**ORDER** Order(LTIC's Motion for Summary Judgment is Granted VD11720401 970907313 LAWYERS TITLE INSURANCE CORPOR Civil No. 970907313 Judge W. Brent West

On April 21, 2004, at the hour of 2:00 p.m., this Court heard oral argument on the following Motions: Defendant Lawyers Title Insurance Company's ("LTIC") Motion for Summary Judgment; Plaintiff Big Sky Finance Company's ("Big Sky") Cross Motion for Summary Judgment; Rule 56(f) Motion for Continuance; and Motion to Amend Big Sky's

Amended Complaint. Plaintiff having appeared by and through its counsel Douglas M. Durbano, of the Durbano Law Firm, Defendant LTIC having appeared by and through its counsel Richard A. Rappaport and Edward T. Vasquez of COHNE, RAPPAPORT & SEGAL, P.C., and Paul M. Belnap appeared for Defendant Fireman's Fund Insurance Company. The Court having reviewed the pleadings, supporting materials, and having heard oral argument on the aforementioned Motions, has determined that Big Sky's Amended Complaint asserts a single cause of action against LTIC, that being a claim for fraudulent non-disclosure. Big Sky's Amended Complaint does not mention or assert any claim against LTIC under Utah Code Ann. § 31A-23-308, renumbered as Utah Code Ann. § 31A-23a-407 (2004), nor does Big Sky's Amended Complaint mention or assert a claim against LTIC under any agency theory, specifically, that Avis and Archibald was LTIC's agent for escrow purposes.

Big Sky's Amended Complaint alleges that LTIC fraudulently failed to disclose the existence of Defendant Avis and Archibald's professional liability policy ("E&O Policy"). It is not disputed that LTIC has provided Big Sky with all of the information that Big Sky requested concerning Avis and Archibald's E&O Policy. The Court has also determined that LTIC had no duty to disclose to Big Sky the existence of Avis and Archibald's E&O Policy. Therefore, based upon the foregoing, the Court issues the following Conclusions of Law:

CONCLUSIONS OF LAW

LTIC'S MOTION FOR SUMMARY JUDGMENT

1. The undisputed facts show that LTIC made no attempt to secret away or fraudulently conceal information concerning the existence of Avis and Archibald's E&O Policy.

2. LTIC had no duty to disclose to Big Sky the existence of Avis and Archibald's E&O Policy.

3. Big Sky's fraudulent nondisclosure claim against LTIC fails as a matter of law, and the Court therefore grants LTIC's Motion for Summary Judgment, dismissing with prejudice Big Sky's sole claim against LTIC.

BIG SKY'S RULE 56(f) MOTION

1. The Court finds that Big Sky's Affidavit in support of its Rule 56(f) Motion is insufficient to sustain Big Sky's Motion for the following reasons:

a. *Big Sky's Affidavit lacks foundation and specificity as to what* information it seeks with respect to its claims against LTIC in the Amended Complaint; and

b. Big Sky has failed to identify with any specificity what "policies of insurance" it alleges existed and whether LTIC was a party to these alleged policies.

2. Having granted LTIC's Motion for Summary Judgment, concluding that LTIC had no duty to disclose to Big Sky the existence of Avis and Archibald's E&O Policy, that LTIC responded to all inquiries for information from Big Sky concerning that E&O Policy, and that Big Sky's Rule 56(f) Affidavit is insufficient, the Court hereby denies Big Sky's Motion for Rule 56(f) Continuance. Additional discovery in this matter is not warranted and Big Sky's Motion is denied.

BIG SKY'S CROSS MOTION FOR SUMMARY JUDGMENT

1. The court finds that Big Sky moved for summary judgment on claims under Utah Code Ann. § 31A-23-308, renumbered as Utah Code Ann. § 31A-23a-407, and under an agency theory, that it failed to plead in its Amended Complaint.

2. Having found that Big Sky has failed to assert these claims against LTIC in its Amended Complaint, the Court hereby denies Big Sky's cross motion for summary judgment.

BIG SKY'S MOTION TO AMEND ITS AMENDED COMPLAINT

1. Having reviewed the requisite three factors for determining the merits of Big Sky's Motion to Amend, specifically, Big Sky's timeliness in bringing its Motion; Big Sky's justification for delay; and any resulting prejudice to LTIC if the Court should grant Big Sky's Motion, the Court issues the following Findings of Fact and Conclusions of Law:

a. Timeliness: The Court concludes that Big Sky's Motion to Amend is untimely. Big Sky had a potential statutory cause of action against LTIC under Utah Code Ann. § 31A-23-308, renumbered as Utah Code Ann. § 31A-23a-407, from the onset of the present litigation. However, Big Sky elected not to assert that statutory claim until LTIC moved for summary judgment to dismiss the sole claim asserted against it, nearly seven years after filing its initial Complaint. Big Sky's request for leave to amend is untimely.

b. Justification for Delay: The Court acknowledges that Big Sky was involved in an adversary bankruptcy proceeding related to the present matter; however, Big Sky's involvement in that proceeding does not provide adequate justification for Big Sky's delay in seeking leave to amend its Amended Complaint. As stated above, Big Sky had a potential statutory cause of action well before it filed the present Motion to Amend.

The Court concludes that Big Sky has failed to show justification for its untimely Motion.

c. Prejudice: The Court concludes that were it to grant Big Sky's Motion to Amend, doing so would unduly prejudice LTIC, because Big Sky's potential Section 31A-23a-

407 claim would be barred by the applicable statute of limitations allowing Big Sky to bring a legally futile claim; LTIC would have to prepare a defense to new claims being asserted at this time; although the events leading to these new causes of action occurred nearly seven years ago; and LTIC will likely have difficulty locating witnesses and documents.

For these reasons the Court concludes that LTIC would be unduly prejudiced were this Court to grant Big Sky's Motion to Amend.

2. The Court having made the aforementioned Conclusions of Law, hereby denies Big Sky's Motion to Amend.

IT IS HEREBY ORDERED that:

1. LTIC's Motion for Summary Judgment is Granted in its entirety;

2. Big Sky's Rule 56(f) Motion for a Continuance is Denied;

3. Big Sky's Cross Motion for Summary Judgment is Denied;

4. Big Sky's Motion to Amend is Denied; and

5. LTIC is dismissed as a Defendant in this matter.

DATED this 8th day of June, 2004.

BY THE COURT

W. Brent West

The Honorable W. Brent West
Second Judicial District Court

APPROVED AS TO FORM:

_____

Douglas M. Durbano
Attorney for Big Sky Finance Co.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed, by first class U.S. postage prepaid, this 25 day of June, 2004, to:

Douglas M. Durbano
DURBANO LAW FIRM
476 W. Heritage Park Blvd., Suite 200
Layton, UT 84041
Attorneys for Plaintiff

Paul M. Belnap
STRONG & HANNI
9 Exchange Place, 6th Floor
Salt Lake City, Utah 84111

Tab B

Douglas M. Durbano (#4209)
DURBANO LAW FIRM
Attorneys for Plaintiff
476 W. Heritage Park Blvd., Suite 200
Layton, Utah 84041
Telephone: 801-776-4111

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH

BIG SKY FINANCE COMPANY, a Utah corporation, Plaintiff, vs. AVIS AND ARCHIBALD TITLE INSURANCE AGENCY, limited company, LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation doing business in the State of Utah, FIREMAN'S FUND INSURANCE COMPANY, a California corporation doing business in the State of Utah, TITLE PAC, INC., an Oklahoma company business in the STATE OF UTAH, JAYSON CHERRY, WILLIAM A. AVIS, and ROBIN ARCHIBALD, Defendants.	**AMENDED COMPLAINT** Civil No. 970907313 Judge W. Brent West

Plaintiff, through counsel undersigned for its cause of action against Defendants complains and alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff is a Utah corporation with its principal place of business in Weber County, State of Utah.

2. Defendant Avis and Archibald Title Insurance Agency, limited company ("Avis and Archibald") is a limited company doing business in Weber County, State of Utah.

3. Defendant Jayson Cherry is an escrow agent doing business in Weber County, State of Utah.

4. Robin Archibald and William A. Avis are the principals in the Avis and Archibald Title Insurance Agency and both reside in Weber County, State of Utah.

5. Lawyers Title Insurance Corporation ("Lawyers Title") is a Virginia company doing business in Weber County, State of Utah.

6. TitlePac, Inc. ("TitlePac"), is an Oklahoma company doing business in Weber County, State of Utah.

7. Fireman's Fund Insurance Company ("Fireman's Fund") is a California corporation doing business in Weber County, State of Utah.

8. That on February 26, 1997, Plaintiff sent a letter to Defendants Avis and Archibald with specific escrow terms for a loan to Wayne Ogden for the sole purpose of purchasing real property on Midland Drive in Roy City, Weber County, State of Utah.

9. On or about March 10, 1997, Plaintiffs delivered to Jayson Cherry, an employee of Defendant Avis and Archibald $396,000.00 to be held in escrow with Defendants Avis and Archibald.

10. That said funds were not to be disbursed except pursuant to specific written instructions from Plaintiff.

11. That contrary to the written instructions from Plaintiff, Defendants Avis and Archibald and Jayson Cherry disbursed the funds to Wayne Ogden by issuing check number 5428 in the amount of $396,000.00.

12. Defendants Avis and Archibald and Jayson Cherry were instructed by Plaintiff and Wayne Ogden that Plaintiff's $396,000.00 was to be repaid with a $600,000.00 payment to be secured by a trust deed recorded against the Midland Drive property.

13. Upon information and belief Defendants Avis and Archibald and Jayson Cherry as escrow agent and fiduciary to Plaintiff disbursed the escrow funds for purposes other than purchasing the Midland Drive property.

14. Defendants Avis and Archibald and Jayson Cherry disbursed such funds without recording a trust deed for the benefit of Plaintiff and without disclosing the disbursement to Plaintiff.

15. Plaintiff has attempted to file a claim under Avis and Archibald's professional liability policy but has been unable to get the policy or policy number from the Defendant insurance companies.

16. Defendant Avis and Archibald had a professional liability policy from Defendant Fireman's Fund as evidenced by a copy of a check from Defendant Fireman's Fund to Defendant Avis and Archibald for $132,545.49 for a claim made during the same period as Plaintiff's claim (See Exhibit "B").

17. Plaintiff was informed by Interstate Insurance Group, the adjuster for Defendant Fireman's Fund, that Defendant Fireman's Fund disclaimed coverage to Avis and Archibald on Plaintiff's claim (See Exhibit "C").

FIRST CAUSE OF ACTION

18. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

19. As escrow agent of Plaintiff, Defendants Avis and Archibald and Jayson Cherry had a duty to strictly comply with all escrow instructions to Plaintiff and to not distribute the funds except by specific instruction.

20. Plaintiff alleges that Defendants Avis and Archibald and Jayson Cherry failed to exercise ordinary skill care in their duty to follow escrow instructions and have negligently breached such duty.

21. Plaintiff has been damaged by Defendants Avis and Archibald and Jayson Cherry's negligent breach of duty to follow escrow instructions in an amount to be established upon proof at the time of trial.

22. As a result of Defendants Avis and Archibald and Jayson Cherry's negligent failure to follow escrow instructions, Plaintiff has been required to obtain the services of the Durbano Law Firm in bringing this action and incurred reasonable attorney's fees herein for which it seeks compensation.

SECOND CAUSE OF ACTION

23. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

24. As escrow agent of Plaintiff, Defendants Avis and Archibald and Jayson Cherry had a duty to disclose to Plaintiff any defects or failures in the transaction which were known or should have been known by the agent.

25. Upon information and belief Plaintiff alleges that Defendants Avis and Archibald and Jayson Cherry knew or should have known that the escrow funds were not used for the purposes intended by Plaintiff and that there were various other irregularities in the transaction which could

and did cause damage to the Plaintiff and that despite these irregularities Defendants Avis and Archibald and Jayson Cherry failed to disclose any information to Plaintiff voluntarily.

26. Defendants Avis and Archibald and Jayson Cherry failed to exercise ordinary skill and care in fulfilling their duty and therefore breached their duty to disclose information regarding irregularities in the transaction for which Plaintiff escrowed the funds which failure to timely disclose caused Plaintiff to lack sufficient information to protect its interest.

27. Defendants Avis and Archibald and Jayson Cherry's negligent failure to disclose has damaged Plaintiff in an amount to be established upon proof at the time of trial.

28. As a result of Defendants Avis and Archibald and Jayson Cherry's negligent failure to disclosure, Plaintiff has been required to obtain the services of the Durbano Law Firm and in bringing this action has incurred reasonable attorney's fees herein for which it seeks compensation.

THIRD CAUSE OF ACTION

29. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

30. As escrow agent of Plaintiff, Defendants Avis and Archibald and Jayson Cherry have a duty to record any trust deed or other security instrument which protects Plaintiff's security interest in real property which is the subject of the transaction.

31. That in fact the specific instructions provided by Plaintiff require that a deed of trust with assignment of rents be recorded in a first lien position and guaranteed an insured by Lawyer's Title as a deed of trust to secure the $600,000 Promissory Note.

32. Upon information and belief, Defendants Avis and Archibald and Jayson Cherry failed to record any Trust Deed on behalf of Plaintiff on the Midland Drive property prior to the disbursement of escrow funds contrary to the specific escrow instructions.

33. Defendants Avis and Archibald and Jayson Cherry failed to exercise ordinary skill and care in obtaining the recording of the anticipated trust deed which secured Plaintiff's interests and therefore have negligently breached their duty of care which breach has damaged Plaintiff in an amount to be established upon proof at the time of trial.

34. As a result of Defendants Avis and Archibald and Jayson Cherry's negligent failure to follow escrow instruction, Plaintiff has been required to obtain the services of the Durbano Law Firm in bringing this action and incurred reasonable attorney's fees for which it seeks compensation.

FOURTH CAUSE OF ACTION

35. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

36. Defendants Avis and Archibald and Jayson Cherry's actions as alleged in each of the above causes of action constitute a reckless indifference to Plaintiff's interests which are the very interests that Defendants Avis and Archibald and Jayson Cherry are duty bound to protect as escrow agent and fiduciary of Plaintiff. Given the agency relationship between the parties and the fact that Defendants Avis and Archibald and Jayson Cherry are in the business of acting as escrow agents, Defendants Avis and Archibald and Jayson Cherry's conduct toward Plaintiff is egregious and outrageous and provides a strong basis for punitive and exemplary damages against Defendants Avis and Archibald and Jayson Cherry equal to or exceeding $500,000.00.

37. As a result of such outrageous conduct and reckless indifference of Defendants Avis and Archibald and Jayson Cherry, Plaintiff has been required to retain the services of the Durbano Law Firm and in bringing this action has incurred reasonable attorney's fees herein for which it seeks compensation.

FIFTH CAUSE OF ACTION

38. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

39. Defendant Avis and Archibald holds itself out to the public as a professional title insurance agency, competent in the area of providing title services for property transactions.

40. When Plaintiff utilized the services of Defendant Avis and Archibald based upon Defendant Avis and Archibald's above-stated representation, Defendant Avis and Archibald had a duty to provide title services that fell within the standard of care for the applicable title industry.

41. By permitting money to be transferred out of escrow in contradiction to Plaintiff's written escrow instructions, and failing to properly maintain policies and train employees and agents regarding the requirement to follow written escrow instructions, Defendant Avis and Archibald breached its duty of care to Plaintiff to safeguard Plaintiff's money in accordance with Plaintiff's escrow instructions and industry standards, and such negligence has damaged Plaintiff in an amount to be established upon proof at the time of trial.

42. As a proximate result of Defendant Avis and Archibald's errors, Plaintiff has been required to obtain the services of the Durbano Law Firm and in bringing this action has incurred reasonable attorney's fees for which it seeks compensation.

SIXTH CAUSE OF ACTION

43. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

44. Defendants Lawyers Title and Fireman's Fund knew that Defendant Firemen's Fund's agent, Defendant TitlePac, had issued a professional liability insurance policy to Defendant Avis and Archibald that was in force at the time of Plaintiff's claim.

45. Defendants Lawyers Title, Fireman's Fund, and TitlePac have fraudulently attempted to conceal from Plaintiff that a professional liability insurance policy exists for Defendant Avis and Archibald to cover Plaintiff's claim, which fraud has damaged Plaintiff in an amount to be established upon proof at the time of trial.

46. Plaintiff is a third party beneficiary under any and all policies of insurance issued by Lawyers Title, Fireman's Fund and TitlePac, and that these parties are contractually liable for their insurance liabilities.

SEVENTH CAUSE OF ACTION

47. Plaintiff hereby realleges and incorporates by reference all paragraphs hereinabove as though specifically set forth herein.

48. Defendants Robin Archibald and William A. Avis knew that, although their agency was required by Section 31A-23-211, Utah Code Annotated, to maintain a fidelity bond or professional liability insurance policy in a face amount no less than $50,000 to provide protection against the improper performance of any service in conjunction with the issuance of a contract or policy of title insurance, that no such policy existed at the time that it agreed to escrow Plaintiff's money and follow Plaintiff's escrow instructions.

49. Defendants Robin Archibald and William A. Avis knew at that if they disclosed to Plaintiff that the money Plaintiff was escrowing with their agency was not covered by a fidelity bond or professional liability insurance policy in a face amount no less than $50,000, that Plaintiff would have refused to escrow his money with Defendant Avis and Archibald.

50. The failure of Defendants Robin Archibald and William A. Avis to inform Plaintiff that no fidelity bond or professional liability insurance policy was in place for Plaintiff's escrow

transaction constituted a fraud which fraud has damaged Plaintiff in an amount to be established upon proof at the time of trial.

51. As a result of the fraud of Defendants Robin Archibald and William A. Avis, Plaintiff has been required to obtain the services of the Durbano Law Firm in bringing this action and incurred reasonable attorney's fees for which it seeks compensation.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For a finding that Defendants Avis and Archibald and Jayson Cherry negligently breached their duty of skill and care of Plaintiff in relation to the escrowed funds;

2. For a finding that Defendants Lawyer's Title, Fireman's and TitlePac is liable for damages incurred by their insured and that they committed a fraud upon Plaintiff in relation to the denial of Plaintiff's claim for damages in relation to the escrowed funds and the unwillingness to produce a policy or policy number for such insurance;

3. For an award of damages in favor of Plaintiff in an amount to be established upon proof at the time of trial;

4. For punitive and exemplary damages in the amount of $500,000;

5. For attorney's fees and costs incurred by Plaintiff in bringing this action; and

6. For such other and further relief as the Court deems just and proper.

DATED this 31st day of December, 2001.

DURBANO LAW FIRM

Douglas M. Durbano
Attorneys for Plaintiff

Plaintiff's Address:
476 W. Heritage Park Blvd., Suite 200
Layton, Utah 84041

THE FACE OF THIS CHECK HAS A MULTI-COLORED BACKGROUND-THE BACK HAS AN ARTIFICIAL WATERMARK. HOLD AT AN ANGLE TO VIEW.

Fireman's Fund

THE NORTHERN TRUST COMPANY, CHICAGO, IL 6710
PAYABLE THROUGH NORTHERN TRUST DUPAGE, OAK BROOK, IL

Check No. 38684787

70-
7

olicy No. CME 04006136 Claim No. B550L97000034 Date of Loss 06/18/97

sured AVIS & ARCHIBALD TITLE INSURAN Issue Location CHICAGO Issue Date 03/16/98

ONE HUNDRED THIRTY-TWO THOUSAND, FIVE HUNDRED FORTY-FIVE----
AND 49/100 ----------

$132,545.49

ay
the
rder of LAWYERS TITLE INSURANCE CORP.
600 NORTH PEARL, SUITE 700,
LOCK BOX 182
DALLAS TX 75201

For ANY AND ALL CLAIMS, FOR FULL A
ND FINAL PAYMENT

SENIOR VICE PRESIDENT AND TREASURER

⑈38684787⑈ ⑆071923828⑆0311754 18⑈ 7

EXHIBIT "B"

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INTERSTATE
INSURANCE
GROUP

RECEIVED
AUG 06 2001

55 East Monroe Street
Chicago, Illinois 60603
312-346-6400
FAX 312-346-5748

August 1, 2001

Durvano Law Firm
476 West Heritage Park Blvd.
Suite 200
Layton, UT 84041

Attn: Douglas M. Durvano

Re: Our Insured: Avis & Archibald Title Insurance
Claim No.: 55001001300

Dear Mr. Durvano:

This will acknowledge receipt of your July 10, 2001 letter with regards to the above-captioned file.

Please be advised that on June 6, 2001, the Fireman's Fund Insurance Company disclaimed coverage to Avis & Archibald Title Insurance on this matter.

Sincerely,

Michael J. Kopala, CPCU
General Adjuster

MJK/tra11
7/27

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EXHIBIT "C"

Tab C

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Tab D

Douglas M. Durbano (#4209)
DURBANO LAW FIRM
Attorneys for Plaintiff
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Layton, Utah 84041
Telephone: 801-776-4111

SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
OGDEN DEPARTMENT, STATE OF UTAH

BIG SKY FINANCE COMPANY, a Utah corporation, Plaintiff, vs. AVIS AND ARCHIBALD TITLE INSURANCE AGENCY, limited company, LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation doing business in the State of Utah FIREMAN'S FUND INSURANCE COMPANY, a California corporation doing business in the state of Utah, TITLE PAC, INC., an Oklahoma company doing business in the State of Utah, JAYSON CHERRY, WILLIAM A. AVIS, and ROBIN ARCHIBALD, Defendants.	**PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION MEMORANDUM REGARDING MOTION TO AMEND** Civil No. 970907313 Judge W. Brent West

Plaintiff, Big Sky Finance Company ("Big Sky") by and through its counsel of record hereby submits the following reply to Defendants' Opposition Memorandum Regarding Motion to Amend.

STATEMENT OF FACTS

1. This controversy started when Avis and Archibald mishandled $400,000.00 which was placed in escrow, by releasing it to Wayne Ogden, contrary to written instructions. Ultimately the funds were paid back to the escrow, by way of other investors of Wayne Ogden's ponzi scheme.

of limitations. But, this argument is circular in that it assumes Lawyer's Title as principal had no notice in the original or first Amended Complaint of the actions perpetrated by its agent. Notwithstanding that this defense is not available, the Plaintiff would have numerous legal and factual arguments which may defeat any statute of limitations defense, even if the Plaintiff were bringing this action for the first time. For example, where the Defendant secrets itself from the state, hides or otherwise denies that there is a policy of insurance or contractual obligation which would bind it, or otherwise perpetrates acts of misrepresentation or fraud, then the statute of limitations would not begin to run until the Plaintiff had the necessary facts to know of its cause of action. Also, Plaintiff's cause of action may not have fully accrued until it had suffered actual damages, which did not occur until the appeal was finalized, in which Big Sky was held liable to the Bankruptcy Trustee for a preferential transfer, which appeal was handed down in December of 2002, approximately one year ago. Further, any amended cause of action relates back to the original filing. Finally, a claim against the agent tolls the statute of limitations for the same claims against its principal, especially an undisclosed principal.

Therefore, the three points enumerated in the Bronson, case have been met in this case, i.e., that there has been no delay, or in other words the motion is timely, and the justification for the delay was that the parties were waiting for the outcome of the 10th Circuit Court of Appeals, and there has not been any resulting legal prejudice to the responding party.

Lawyer's Title also argues that the case of Bodell Constr. Co. v. Stewart Guar. Co., 954 P.2d 119 (Ut. Ct. App. 1997) would provide a defense in this matter rendering the proposed amendment "Legally Insufficient and Futile" at page 10 of Response Memorandum.

Tab E

§ 31A–23a–407. Liability of title insurers for acts of title insurance producers

Any title company, represented by one or more title insurance producers, is directly and primarily liable to others dealing with the title insurance producers for the receipt and disbursement of funds deposited in escrows with the title insurance producers in all those transactions where a commitment or binder for or policy or contract of title insurance of that title insurance company has been ordered, or a preliminary report of the title insurance company has been issued or distributed. This liability does not modify, mitigate, impair, or affect the contractual obligations between the title insurance producers and the title insurance company.

Laws 1985, c. 242, § 28; Laws 2002, c. 308, § 57, eff. May 6, 2002; Laws 2003, c. 298, § 67, eff. May 5, 2003.

Codifications C 1953, § 31A–23–308.

Tab F

Bruce A. Maak, Of Counsel (2033)
Paul C. Drecksel (5946)
PARR, WADDOUPS, BROWN, GEE & LOVELESS
Attorneys for Defendant
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Telephone: 801-532-7840
Fax: 801-532-7750

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

MILLENNIA INVESTMENT CORPORATION, Plaintiff, vs ATTORNEYS TITLE GUARANTY FUND, INC., et al., Defendant.	**ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT** Civil No. 000902574 CN Judge: J. Dennis Frederick

The Motion for Partial Summary Judgment of plaintiff Millennia Investment Corporation, a Utah corporation ("Millennia") dated June 30, 2000 and the Motion for Partial Summary Judgment of Attorneys Title Guaranty Fund ("ATGF") dated October 17, 2000 came on regularly for hearing before the Court, the Honorable J Dennis Frederick presiding at 9:00 a.m. on February 26, 2001, Millennia appearing through its counsel, Thomas R. Karrenberg, Stephen W. Dougherty, and Nathan B. Wilcox, and ATGF appearing through its counsel, Paul C. Drecksel and Bruce A. Maak, and the Court having reviewed the file and pleadings and the materials

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submitted by the parties with respect to both Motions, having heard argument of counsel, being fully advised in the premises, and good cause appearing therefor,

IT IS HEREBY ruled and ordered as follows:

A. Millennia's Motion for Partial Summary Judgment. Millennia's Motion for Partial Summary Judgment sought partial summary judgment adjudicating ATGF's liability for $433,625.00 in principal and interest thereon based upon Millennia's positions that Millennia was the assignee of White Properties ("White"), and White deposited $433,625.00 into an escrow account with Granite Title, White allegedly ordered and paid for a title policy from ATGF, and Granite Title misappropriated the deposited funds, as a result of which Millennia claims ATGF is liable to it under Utah Code Ann. §31A-23-308. Millennia submitted the Affidavit of Alan Combs dated June 30, 2000 in support of its Motion ("Combs Affidavit"). Thereafter, Millennia submitted the Affidavits of Raymond Horsley dated November 8, 2000 ("Horsley Affidavit"), the Affidavit of Dan Jones dated November 21, 2000 ("Jones Affidavit"), and the Affidavit of Lewis Livingston dated November 10, 2000 ("Livingston Affidavit"). ATGF moved to strike portions of the Combs and Livingston Affidavits. The Court rules and orders as follows with respect to Millennia's Motion for Partial Summary Judgment and ATGF's Motions to Strike Portions of the Combs and Livingston Affidavits:

1. ATGF's Motion to Strike Portions of the Combs Affidavit is hereby granted. Paragraphs 2 through 9 of the Combs Affidavit are inadmissible and must be stricken because they fail to comply with Utah Rules of Civil Procedure Rule 56(a), the affiant lacked personal knowledge of the matters stated therein, the statements contained therein lack foundation, the statements therein mischaracterize the evidence, the statements therein improperly describe the

contents of documents in violation of the best evidence rule, and the statements therein constitute improper legal conclusions.

2. Paragraphs 2 through 9 of the Combs Affidavit be and the same are hereby stricken.

3. ATGF's Motion to Strike the Livingston Affidavit be and the same is hereby granted. Paragraphs 4, 5, 6, 8, 10, and 11 of the Livingston Affidavit must be stricken pursuant to Utah Rules of Civil Procedure Rule 56(e) and applicable law because they contain impermissible representations regarding legislative history, conclusory statements without evidentiary foundation, and inadmissible legal opinions.

4. Paragraphs 4, 5, 6, 8, 10, and 11 of the Livingston Affidavit be and the same are hereby stricken.

5. The evidentiary materials submitted by ATGF give rise to multiple genuine issues of material fact which preclude the granting of Millennia's Motion for Summary Judgment, and Millennia failed to demonstrate by admissible evidence an entitlement to summary judgment.

6 As set forth in greater detail below under paragraph B.2 and B.3, Utah Code Ann. §31A-23-308 is unenforceable as a matter of law because it is violative of equal protection and due process clauses of the Utah Constitution and/or if constitutionally construed, that statute does not apply to the facts presented here.

7. Attached hereto marked Exhibit 1 is a five page document alleged by Millennia to constitute a commitment for title insurance that fulfills the requirements of Utah Code Ann. §31A-23-308. Based upon the undisputed facts, Exhibit 1 does not constitute a commitment or binder for or policy or contract of title insurance of ATGF or a preliminary report of ATGF

within the meaning of Section 31A-23-308 for each of the following independent reasons: (i) Exhibit 1 does not mention ATGF, Exhibit 1 on its face states that it is enforceable only if a cover is attached, and no cover was attached, Exhibit 1 does not contain essential elements required to form a commitment to issue title insurance because it contains no commitment or agreement to issue a policy, and does not identify a proposed insured; (ii) Exhibit 1 does not qualify as a binder or commitment under the governing statutes, which require that a binder or commitment contain a description of the subject and amount of insurance; (iii) Exhibit 1 is too indefinite to create an enforceable contract because it lacks essential material terms, including the amount of insurance to be provided, the amount of the insurance premium, and the name of the insured; and (iv) Exhibit 1 was not issued with respect to the transaction in connection with which the funds in question were misappropriated.

8. There exist disputed issues of material fact as to whether Millennia/White ever orally or by letter requested or ordered a policy of title insurance of ATGF at all. Based upon the undisputed facts, however, there was no ordering of a commitment, binder, policy or contract of title insurance within the meaning of Utah Code Ann. Section 31A-23-308 because no enforceable order was received by ATGF To constitute such an enforceable order, the order must have been written, contain all essential terms, and be accepted by ATGF, none of which occurred here.

9 Based upon the undisputed facts, Millennia and White looked to Horsley (who was an employee of Granite Title), individually to perform for Millennia/White functions relating to the origination of the subject loan, to act as a loan broker, to negotiate with the borrower with respect to the loan, and to perform due diligence. White and Millennia also expected Horsley to

handle the closing of the subject loan as a Granite Title employee and in that capacity arrange for the issuance of a title insurance policy as the agent of a title insurance company White and Millennia's deposit of funds with Horsley, who was performing acts both as an employee of Granite Title and separately and individually for Millennia/White, is not a transaction intended to be covered by Utah Code Ann §31A-23-308, even assuming it were constitutional

10. Based upon the undisputed facts, Millennia and White were aware that Horsley was individually accepting a substantial payment from them in connection with a transaction in which they expected Horsley to act as an employee of Granite Title in handling the closing and arranging for the issuance of a title policy Millennia and White's causing or allowing Horsley to undertake duties for both Granite Title and separately for them, coupled with ATGF's ignorance of those matters, created a conflict of interest and breach of the duties that Horsley owed Granite Title and through it to ATGF ATGF is entitled to rescission of any commitment, binder, policy or contract of title insurance or preliminary report that was issued, assuming such issuance occurred in this case, which did not in fact occur

11 Based on the undisputed facts, Horsley acted on behalf of White and Millennia in originating their loan, performing due diligence on their loan, and handing all contact with the prospective borrowers concerning the loan and closing and was individually paid a $4,000 00 fee upon closing by Millennia/White Those actions were not within the scope of Horsley's authority with Granite Title or Granite Title's authority with ATGF Horsley knew the fraudulent nature of the transaction in which he was acting ATGF was ignorant of the circumstances surrounding the transaction Because Horsley's knowledge of the fraudulent nature of the transaction was integrally related to his duties for White and Millennia, that knowledge is imputed to White and

Millennia. Because Horsley's duties to Granite Title and to Granite Title on behalf of ATGF had no connection with the subject matter to which his knowledge related, his knowledge of the fraudulent nature of the transaction is not imputed to ATGF.

12. For the foregoing reasons, Millennia's Motion for Partial Summary Judgment be and it is hereby denied.

B. ATGF's Motion for Partial Summary Judgment. ATGF moved for partial summary judgment upon the grounds (i) that Section 31A-23-308 violates constitutional equal protection requirements, (ii) that statute violates constitutional due process requirements, and (iii) if that statute is enforceable and applies here, then the jury must apportion damages by comparing the relative fault of appropriate parties under Utah Code Ann. §78-27-38.

1. There exist no genuine issues of material fact bearing upon ATGF's Motion for Summary Judgment.

2. Utah Code Ann. §31A-23-308 violates Article I, Section 24 of the Utah Constitution (which requires that "[a]ll laws of a general nature shall have uniform operation") because it treats title insurers differently than other similarly situated entities without a reasonable basis. Title insurance agents both handle escrow closings and issue title insurance on behalf of title companies (which are the actual insurers). In addition to title insurance agents, escrow companies, lawyers, banks, mortgage brokers, and real estate agents handle funds in connection with real estate closings and escrows, but only closings handled by title insurance agents subject title companies to liability. There is no rational basis upon which strict liability can be imposed on title companies but not on other similarly situated principals. Although parties may place funds in escrow with entities other than title insurance agents, the statute

singles out title companies as the only entity that may be held strictly liable for the mishandling of such funds and only subjects them to liability as to closings handled by title insurance companies.

3. Utah Code Ann. §31A-23-308 violates the due process clause of the Utah Constitution, Article I, Section 7 because the statute imposes liability on someone other than the party at fault (here, the title company) which had no knowledge of and could not be expected to have prevented the actionable conduct. To construe §31A-23-308 in a constitutionally permissible manner requires that the statute be read to require that the title company have some knowledge and/or control over the fraudulent acts of the title insurance agent before liability is imposed. Thus, the statute must be read to require that the title company issue or distribute a commitment, accept an order for title insurance, or otherwise participate in the transaction before being held liable. Because the undisputed facts establish that ATGF had no knowledge of the transaction and did not issue or distribute a commitment or accept an order for title insurance, the statute, construed constitutionally, does not subject ATGF to liability.

4. Because of the other rulings of the Court, the Court does not address ATGF's argument that liability under Section 31A-23-308 must be allocated in accordance with Utah's comparative fault statute.

5. The Motion for Partial Summary Judgment of ATGF be and the same is hereby granted.

6. The First Cause of Action of the Complaint herein of Millennia be and the same is hereby dismissed with prejudice and upon its merits. This Order does not address whether or not its various rulings affect the other causes of action contained in the Complaint.

C. Miscellaneous. The Court defers its decision on an award of costs until the Court enters a final Order disposing of all of the claims of all of the parties in this action.

MADE AND ENTERED this 16th day of April, 2001.

BY THE COURT:

J. DENNIS FREDERICK
DISTRICT COURT JUDGE

SALT LAKE COUNTY - SALT LAKE CITY
STATE OF UTAH
DISTRICT COURT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT** was served by hand delivering a copy this 21st day of March, 2001, addressed to:

Thomas R. Karrenberg, Esq.
Nathan B. Wilcox, Esq.
ANDERSON & KARRENBERG
Attorneys for Plaintiff
700 Bank One Tower
50 West Broadway
Salt Lake City, UT 84101

Kris Henriod
Kris Henriod, Secretary

Tab G

C

Court of Appeals of Utah.
Nana G. PENROSE, Plaintiff and Appellant,
v.
Bryant ROSS, an individual (formerly identified as Doe 1); Christopher Ross, an individual; Does 2-5, inclusive, whose true names are not known to plaintiff, Defendants and Appellee.
No. 20010943 CA.

May 22, 2003.

Motorist, days before statute of limitations was to expire, filed complaint alleging owner of other vehicle and Does 1 - 5 pulled of parking lot and negligently hit her vehicle. After statute of limitations expired motorist amended her complaint to identify son of vehicle's owner as the driver of the vehicle. The Third District Court, Salt Lake Department, Leon A. Dever, J., granted owner's and son's motions for summary judgment, and motorist appealed the summary judgment for owner's son. The Court of Appeals, Greenwood, J., held that: (1) failure to name son in original complaint was not a misnomer or technical mistake, and (2) father and son did not have an identity of interest for purposes of determining whether amendment related back to date of original complaint despite the running of the statute of limitations.

Affirmed.

West Headnotes

[1] Limitation of Actions 124
241k124 Most Cited Cases

[1] Limitation of Actions 125
241k125 Most Cited Cases
Rule allowing an amendment of a pleading to relate back to the date of the original pleading generally will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings, with the exception that relation back occurs as to both plaintiff and defendant, when new and old parties have an identity of interest, so it can be assumed or proved the relation back is not prejudicial. Rules Civ.Proc., Rule 15(c).

[2] Limitation of Actions 124
241k124 Most Cited Cases

[2] Limitation of Actions 125
241k125 Most Cited Cases
An "identity of interest" exists, for purposes of allowing an amendment to a pleading substituting or adding new parties to relate back to the date of the original pleading, despite the running of the statute of limitations, when the real parties in interest are sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage. Rules Civ.Proc., Rule 15(c).

[3] Limitation of Actions 121(2)
241k121(2) Most Cited Cases
In misnomer cases, the correction of a party name is a formal change, rather than a substantial change; thus, amending the complaint does not affect the rights of the added party, and fairly relates back to the original filing, despite the running of the statute of limitations. Rules Civ.Proc., Rule 15.

[4] Limitation of Actions 121(2)
241k121(2) Most Cited Cases

[4] Limitation of Actions 124
241k124 Most Cited Cases
Amended negligence complaint of motorist, adding as a party the other vehicle's owner's son as the driver of the vehicle that struck her, did not relate back to date of original complaint identifying owner and Does 1-5 as being the negligent parties, on ground that failure to identify owner's son in original complaint was a misnomer or technical

mistake; as evidenced by accident report motorist was given notice at the scene that owner's son was the driver of the vehicle that struck her vehicle. Rules Civ.Proc., Rule 15.

[5] Limitation of Actions 124
241k124 Most Cited Cases
If an identity of interest is established between the party identified in the original pleading and the party added in the amended pleading, a party generally cannot be prejudiced, for purposes of determining whether the amended pleading relates back to the original pleading despite the running of the statute of limitations. Rules Civ.Proc., Rule 15(c).

[6] Limitation of Actions 124
241k124 Most Cited Cases

[6] Limitation of Actions 125
241k125 Most Cited Cases
An "identity of interest," for purposes of determining whether an amended pleading adding or substituting a party relates back to the original pleading despite the running of the statute of limitations, requires parties to have the "same" interest. Rules Civ.Proc., Rule 15(c).

[7] Limitation of Actions 124
241k124 Most Cited Cases
Father and son did not have an "identity of interest" in negligence action of motorist for injuries she received in accident with car owned by father but driven by son, and thus amended complaint adding son as a party did not relate back to original complaint for purposes of the statute of limitations; though son lived with father, was insured under father's insurance policy and father presumably knew that son was driving car and in an accident, defense of father was that he was not negligent or liable because he was not the driver, defense of son would be that statute of limitations expired and that he did not act negligently, and thus a disposition as to either would not affect the claims or defenses available to the other. Rules Civ.Proc., Rule 15(c).
***632** Scott N. Cunningham, Salt Lake City, for Appellant.

Michael W. Wright and Richard K. Glauser, Salt Lake City, for Appellee.

Before Judges DAVIS, GREENWOOD and THORNE.

OPINION

GREENWOOD, Judge:

****1** Nana Penrose (Penrose) appeals the trial court's grant of summary judgment for defendant, Bryant Ross (Ross), claiming error in the court's determination that her ***633** amended complaint does not properly relate back to the original complaint. We affirm.

BACKGROUND
****2** On November 17, 2000, just days prior to the expiration of the statute of limitations on her claim, Penrose filed a complaint for negligence (Original Complaint) against Christopher Ross (Father) and Does 1-5. In the Original Complaint, Penrose alleged that she was traveling southbound on 900 East when Father and Does 1-5 pulled out of a parking lot and hit her car. Penrose claimed that Father and Does 1-5 were negligent in: failing to pay attention to existing and changing traffic conditions; failing to look out for vehicles on the road, resulting in a traffic ticket; driving too fast; and driving and operating an automobile improperly. Penrose claimed damages from serious injuries she sustained, resulting in permanent impairment, mental anguish, sleeplessness, nausea, headaches, and dizziness. Penrose additionally sought damages exceeding $3,000 for various medical services.

****3** On December 27, 2000, after the statute of limitations had run, Penrose filed an Amended Complaint, identifying Doe 1 as Ross, Father's son. Penrose's Amended Complaint names Father as the owner of the vehicle but alleges that the negligent party was Ross, who was driving the car, not Father. Aside from the change in the identity of the negligent party, all other allegations as to cause and injury remained the same as in the Original Complaint.

**4 Father responded to the Original Complaint on January 2, 2001, denying significant parts. [FN1] Father also filed an affidavit on January 5, 2001, stating that although he was the owner of the vehicle involved in the accident, he was not the driver. Father included a copy of the police report that identified Ross as the driver of the car that collided with Penrose.

> FN1. Father's response to the Original Complaint and Penrose's Amended Complaint appear to have crossed in the mail.

**5 Ross filed a Motion for Summary Judgment, claiming the action against him was barred by the statute of limitations. Father also filed a Motion for Summary Judgment, arguing that because Penrose had amended her complaint alleging that Ross was the true driver of the vehicle, he could not be liable.

**6 The trial court granted Ross's Motion for Summary Judgment, determining that the statute of limitations had run and that no identity of interest existed between Father and Ross. The trial court also granted Father's Motion for Summary Judgment, concluding that a "cause of action for negligence may not be made out solely on the basis of ownership." Penrose appeals the summary judgment granted to Ross.

ISSUE AND STANDARD OF REVIEW

**7 Penrose contends that the trial court erred in granting Ross's Motion for Summary Judgment. "In considering an appeal from a grant of summary judgment, we view the facts in a light most favorable to the losing party below. And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, we give no deference to the trial court's conclusions of law: those conclusions are reviewed for correctness." *Blue Cross & Blue Shield v. State,* 779 P.2d 634, 636 (Utah 1989). [FN2]

> FN2. Although Penrose asserts that the trial court's findings of fact are inadequate, we believe the undisputed facts contained in the court's Findings of Fact and Conclusions of Law are sufficient as a matter of law to support its grant of summary judgment.

ANALYSIS

8 The traffic accident from which this suit arose occurred on November 21, 1996. Thus, the statute of limitations for Penrose's claim of negligence expired on November 21, 2000. *See* Utah Code Ann. § 78-12- 25(3) (2002) ("An action may be brought within four years: ... for relief not otherwise provided for by law."); *see also State Bank of S. Utah v. Troy Hygro Sys.,* 894 P.2d 1270, 1274 (Utah Ct.App.1995) (stating claims of negligence are governed by Utah Code Ann. § 78-15-25(3)). On November 17, 2000, just ***634 four days before the expiration of the statute of limitations, Penrose filed her Original Complaint, asserting that Father's negligent driving resulted in an accident injuring Penrose. Penrose properly filed an Amended Complaint prior to service of Father's responsive pleading. *See* Utah R. Civ. P. 15(a) ("A party may amend his pleading once as a matter of course at any time before a responsive pleading is served ...."). However, the Amended Complaint, filed on December 27, 2000, naming Ross as defendant Doe 1, was filed after the statute of limitations expired. Therefore, the issue before this court is whether the Amended Complaint properly relates back to the Original Complaint, thus permitting Penrose to pursue her action against Ross.

[1][2] **9 Utah Rule of Civil Procedure 15(c) governs the relation back of amendments, stating: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." *Id.* Rule 15(c) further "allows a plaintiff to cure defects in his or her original complaint despite the intervening running of a statute of limitations." *Russell v. Standard Corp.,* 898 P.2d 263, 265 (Utah 1995). Generally, however, rule 15(c)

> will not apply to an amendment which substitutes or adds new parties for those brought before the

court by the original pleadings ....

There is an exception to this rule. The exception operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an *identity of interest;* so it can be assumed or proved the relation back is not prejudicial. The rationale underpinning this exception is one which obstructs a mechanical use of a statute of limitations; to prevent adjudication of a claim.

Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976) (emphasis added); *see also Vina v. Jefferson Ins. Co. of N.Y.,* 761 P.2d 581, 586 (Utah Ct.App.1988) (applying identity of interest rule laid out in *Doxey-Layton*). "An identity of interest exists 'when "the real parties in interest were sufficiently alerted to the proceedings, or were involved in them unofficially, from an early stage." ' " *Nunez v. Albo,* 2002 UT App 247,¶ 29, 53 P.3d 2 (quoting *Sulzen v. Williams,* 1999 UT App 76,¶ 14, 977 P.2d 497 (quoting *Doxey-Layton,* 548 P.2d at 906)), *cert. denied,* 59 P.3d 603 (Utah 2002).

**10 Citing the above cases, Penrose argues that there is an "identity of interest" when the real party is alerted to the proceeding so as to avoid prejudice. Penrose reasons that it is reasonable to assume that Father told Ross he was served with a complaint asserting damages resulting from the accident involving Ross because (1) Father was served at the same residence as Ross, (2) Father knew Ross was driving his car and was in an accident, (3) Father knew he was not the driver involved in the accident, (4) Ross was insured by Father's insurance policy, and (5) Father and Ross have the same attorney. Therefore, Penrose argues, Ross had notice of the lawsuit and would not be prejudiced by being added as a named party in the Amended Complaint.

**11 Ross argues that Utah courts have allowed the relation back of amendments to complaints incorporating newly named parties in two types of cases: (1) in so called "misnomer cases," and (2) where there is a true "identity of interest." We agree, but determine this case does not fit either.

[3] **12 In the misnomer cases, Utah has permitted amendments where the complaint contains a technical defect in the naming or identification of a party.

"A misnomer is involved when the correct party was served so that the party before the Court is the one Plaintiff intended to sue, but the name or description of the party in the Complaint is deficient in some respect." 6A [Charles A. Wright, Arthur R. Miller & Mary Kay Kane] *Federal Practice and Procedure* § 1498 (2d ed.1990). Furthermore, "[i]f the body of the complaint correctly identifies the party, or if the proper person has actually been served with process, courts generally will allow an amendment under Rule 15 to correct technical defects in the caption. *635 This seems appropriate inasmuch as a defective caption or even its complete absence is merely a formal error and never shall be viewed as a fatal defect." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1321, at 728-30 (2d ed.1990) (footnotes omitted).

Wilcox v. Geneva Rock Corp., 911 P.2d 367, 370 (Utah 1996) (alteration in original). As explained in *Otchy v. City of Elizabeth Bd. of Educ.,* 325 N.J.Super. 98, 737 A.2d 1151 (App.Div.1999), in misnomer cases, the correction of a party name is a " 'formal' " change, rather than a " 'substantial' " change; thus, amending the complaint "does not affect the rights of the added party, and ... fairly relate[s] back to the original filing[,] despite the running of the statute of limitations." *Id.* at 1155.

**13 For example, in *Sulzen v. Williams,* a woman was hit and killed by a rock dislodged by two minors hiking above her. *See* 1999 UT App 76 at ¶ 2, 977 P.2d 497. In a suit for negligence, the named defendants were the mother and guardian of one of the minors, and the father and guardian of the other minor. *See id.* at ¶ 3. However, the text of the complaint alleged that the minors were the negligent parties. *See id.* at ¶ 4. The trial court granted the parents' motion for summary judgment and prohibited the plaintiffs from amending the complaint to name the minors as defendants because the statute of limitations had run and the parents were admittedly not negligent. *See id.* at ¶ ¶ 5-9. On appeal, this court reversed, stating that the complaint could properly be amended because the parents "had an identity of interest with their

children, *and thus* relating the [plaintiffs'] amendment back would not have been prejudicial." *Id.* at ¶ 15 (emphasis added). Because "the parents [were] incorrectly named as defendants in the original complaint's caption-- i.e., named in the wrong place in the caption's phraseology," we reasoned that although a mistake was made in the naming of the parties, the minor children "were sufficiently alerted to the proceedings, and that they thus had sufficient identity of interest with their parents, to make relation back appropriate." *Id.* (footnote omitted); *see also Wilcox,* 911 P.2d at 370- 71 (permitting an amendment to a complaint that incorrectly named "Geneva Rock Co.," rather than "Geneva Rock Products, Inc.," where the summons correctly listed the company name and the vice president was properly served); 5 Wright & Miller, *supra,* § 1321 ("If the body of the complaint correctly identifies the party ... courts generally will allow an amendment under [r]ule 15 to correct technical defects in the caption.").

[4] **14 This is not the case presented here. Unlike *Sulzen,* where the correct party was specifically identified in the text of the complaint as the negligent party, *see id.* 1999 UT App 76 at ¶ 4, 977 P.2d 497, Ross was not identified in any capacity in the Original Complaint. Here, there was no misnomer or "technical" mistake; Penrose purposefully sued Father for negligence and sought to add Ross as a defendant and the negligent party after the expiration of the statute of limitations. Furthermore, it cannot be argued that Penrose merely made a technical mistake in naming Father as the negligent driver, because, as evidenced by the police report, Penrose was given notice at the scene of the accident that Ross was the driver and Father was the owner of the vehicle. [FN3]

> FN3. The original police report clearly lists Father as owner of the vehicle, Ross as the driver of the vehicle, and specifically charges Ross with "Improper Look Out."

[5] **15 Having determined that the present case is not a misnomer case, we next determine whether a true identity of interest exists, permitting the amended complaint to relate back. If an identity of interest is established, a party generally cannot be prejudiced. *See Doxey-Layton Co. v. Clark,* 548 P.2d 902, 906 (Utah 1976) (stating amendment permitted "where there is a relation back, ... when new and old parties have an identity of interest; so it can be assumed or proved the relation back is not prejudicial"); *Vina v. Jefferson Ins. Co. of N.Y.,* 761 P.2d 581, 586 (Utah Ct.App.1988) (same).

[6] **16 Black's Law Dictionary defines "identity" as "[t]he identical nature of two or more things." Black's Law Dictionary 748 (7th ed.1999). Webster's defines identity as ***636** "sameness of essential or generic character in different instances" and "the condition of being the same with something described or asserted." Webster's Ninth New Collegiate Dictionary 597 (1986). Therefore, an identity of interest requires parties to have the "same" interest. This definition is supported by the Utah Supreme Court in *Attorney General v. Pomeroy,* 93 Utah 426, 73 P.2d 1277, 1294 (1937). In *Pomeroy,* the issue before the court was whether a final judgment as to one issue in a case with multiple parties was effective as to all parties for the purpose of an appeal. [FN4] *See id.* at 1294. The court applied the "identity of interest" test, which it defined as "whether the determination of the issues as to any defendant depends on or affects the determination of the issues as to the other defendants." [FN5] *Id.*

> FN4. Determining whether an identity of interest exists is necessary in numerous contexts. *See, e.g., Doxey-Layton Co. v. Clark,* 548 P.2d 902, 905 (Utah 1976) (finding an identity of interest between decedent and heirs so as to permit an amendment adding heirs as parties); *Nunnelly v. First Fed. Bldg. & Loan Ass'n of Ogden,* 107 Utah 347, 154 P.2d 620, 626 (1944) (outlining rule to determine parties in a class action and requiring there be an identity of interest); *Conder v. Hunt,* 2000 UT App 105,¶ 9, 1 P.3d 558 (noting that claim preclusion applies in limited exception for those in privity with one another evaluated by the parties' identity of

interest); *James Constructors, Inc. v. Salt Lake City Corp.,* 888 P.2d 665, 669 (Utah Ct.App.1994) (stating an identity of interest exists between principal and surety in the context of indemnity).

FN5. *Attorney General v. Pomeroy,* 93 Utah 426, 73 P.2d 1277, 1294 (1937), implemented a rule that the statute of limitations for debt is extended by acknowledgment or partial payment. This rule was superceded by statute, as held in *State Bank of Southern Utah v. Troy Hygro Systems,* 894 P.2d 1270, 1276 (Utah Ct.App.1995). However, its analysis as to identity of interest was not affected.

****17** Similarly, in *Nunez v. Albo,* 2002 UT App 247, 53 P.3d 2, this court determined that an identity of interest existed between an employer and an employee, permitting an amendment to the complaint adding the employer as a party to the complaint. In *Nunez,* a malpractice action was filed against a physician alleging damages caused by the physician's performance of a medical treatment. *See id.* at ¶ 5. Nunez filed a motion to amend the complaint to name the physician's employer, the University of Utah Hospital (Hospital), as a defendant. *See id.* at ¶¶ 5-6. The trial court denied Nunez's motion and she appealed. *See id.* at ¶ 6. In determining whether the amended complaint related back to the original complaint, this court analyzed rule 15(c) and cases outlining the exception permitting the addition of parties where an identity of interest is established. *See id.* at ¶ 29.

****18** We held that an identity of interest existed between the Hospital and the physician because the cause of action " 'arose out of the conduct, transaction, or occurrence set forth ... in the original pleading.' " *Id.* (quoting Utah R. Civ. P. 15(c)). This court also noted that the Hospital had potential vicarious liability as the employer of the physician. *See id.* at ¶¶ 27-34. Further, the University provided legal counsel for the physician, asserting that the physician was acting within the scope of his employment by the Hospital and was entitled to the protections of the Governmental Immunity Act. [FN6] *See id.*

FN6. *Nunez v. Albo,* 2002 UT App 247, 53 P.3d 2, also addressed rule 15(a) of the Utah Rules of Civil Procedure requiring that amendments should be permitted "when justice so requires." *Id.* at ¶ 19. That discussion appropriately focuses on prejudice.

[7] ****19** In *Nunez,* any disposition of the case against the physician would necessarily affect the Hospital's liability. Thus, an identity of interest existed because the legal position and defenses of the two parties were the "same." However, in the present case, had Penrose's Original Complaint properly named the parties, a disposition of the case against Father would not affect a determination as to Ross because the two parties do not have the *same* legal interest in the outcome of the case. Father's defense is that he was not negligent or liable because he was not the driver. On the other hand, Ross's affirmative defense focuses on the running of the statute of limitations. Even if the claim had been properly filed, Ross's defense would be that he did not act negligently. A disposition as to either party does not affect the claims or defenses available to the other ***637** party. Thus, where they do not have the "same" legal interest there is no identity of interest.

****20** Had there been an identity of interest, there would necessarily be no prejudice. In *Nunez,* the court stated, "new defendants sought to be added *must* have an identity of interest with the original party named in the complaint, '*so* it can be assumed or proved the relation back is not prejudicial.' " *Id.* at ¶ 29 (emphasis added) (quoting *Wilcox v. Geneva Rock Corp.,* 911 P.2d 367, 369 (Utah 1996)); *see Doxey-Layton,* 548 P.2d at 905 (same). If prejudice alone dictated whether an identity of interest existed, the exception to amending complaints would swallow the rule and allow relation back whenever an unnamed party happened to know about the filing of a complaint. Therefore, because we find that no identity of interest exists between Father and Ross, we need not address

whether there was prejudice. Furthermore, because there is no identity of interest Penrose's Amended Complaint cannot properly relate back.

CONCLUSION

**21 The trial court correctly determined there was no identity of interest between Father and Ross to permit relation back of the Amended Complaint adding Ross as a defendant. Relation as father and son and Ross's possible knowledge of the Original Complaint are insufficient to create a legal identity of interest in the lawsuit. [FN7] Thus, we affirm.

> FN7. We note that the relation-back provision is an exception to the statute of limitations. Penrose had four years to ascertain the identity of the driver of the car that allegedly injured her. She did not commence that inquiry early enough to avoid the expiration of the statute of limitations.

**22 WE CONCUR: JAMES Z. DAVIS and WILLIAM A. THORNE JR., Judges.

71 P.3d 631, 474 Utah Adv. Rep. 34, 2003 UT App 157

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Tab H

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, in the interest of D.S., S.S., and I.M., persons under eighteen years of age.
M.M., Appellant,
v.
STATE of Utah, Appellee.
No. 20020430-CA.

April 17, 2003.

Third District Juvenile, Salt Lake Department; The Honorable Olof A. Johansson.

Jeffrey J. Noland, Salt Lake City, for Appellant.

Mark L. Shurtleff and Carol L. Verdoia, Salt Lake City, for Appellee.

Martha Pierce and Elizabeth Knight, Salt Lake City, Guardians Ad Litem.

Before Judges JACKSON, BENCH, and ORME.

MEMORANDUM DECISION (Not For Official Publication)

ORME, Judge:

***1** It is questionable whether Appellant's opening brief adequately marshals the evidence. *See Atlas Steel, Inc. v. Utah State Tax Comm'n,* 2002 UT 112, ¶¶ 41-43, 61 P.3d 1053 (requiring an appellant to "undertake and meet its heavy marshaling burden in its opening memorandum of law on appeal" rather than "in its reply brief"). Although the brief does refer to some testimony supporting each challenged finding, it cannot be said that Appellant's counsel, in undertaking the marshaling burden, has amassed all of the supporting evidence, as required by *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct.App.1991).

For example, Appellant challenges finding seventeen, which states that she "has repeatedly and continuously failed to provide the children with adequate food, clothing, shelter, education, or other care necessary for [the children's] physical, mental, and emotional health and development." Appellant's purported marshaling as to this finding consists only of the following statement: "The evidence presented at trial that supports this finding deals only with the alleged instability of Appellant's housing situation and that Appellant had not paid child support." It can hardly be said that this vague evidentiary summary includes "every scrap of competent evidence introduced at trial which *supports* " finding seventeen. *Id.* (emphasis in original). Noticeably absent from this summary is the fact, as the State pointed out in its brief, that it is the foster parents rather than Appellant who have provided the children with sustenance for a substantial amount of time, both before and after they became the children's foster parents.

However, we need not delve into a finding-by-finding analysis of the adequacy of Appellant's marshaling effort because we can readily resolve this case on the merits. The State presented evidence that supports all of the findings that Appellant challenges. Although much of Appellant's and her mother's testimony is contrary to the State's evidence, we defer to the juvenile court's credibility determinations, and we do not disturb the reasonable inferences it drew from the testimony it heard. *See State v. Reed,* 839 P.2d 878, 879 (Utah Ct.App.1992) ("Ultimately, it is the province of the trier of fact to determine which testimony and facts to believe and what inferences to draw from those facts."). Therefore, Appellant's factual challenges are unavailing.

As for the question of whether the trial court was subject to Utah Code Ann. § 78-3a-407(3) (2002), Appellant did not preserve any such argument below and her opening brief fails to "argue plain error or exceptional circumstances, and we therefore decline to address [this] claim." *In re S.Y.*, 2003 UT App 66,¶ 14, 468 Utah Adv. Rep. 10.

Affirmed.

WE CONCUR: NORMAN H. JACKSON, Presiding Judge and RUSSELL W. BENCH, Judge.

Not Reported in P.3d, 2003 WL 21290704 (Utah App.), 2003 UT App 108

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Tab I

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
Tammy BRONSON, Plaintiff and Appellant,
v.
Lisa Ann JONES, Defendant and Appellee.
No. 990997-CA.

Oct. 19, 2000.

Bel Ami de Montreux, Salt Lake City, for appellant.

James H. Woodall, Salt Lake City, for appellee.

Before JACKSON, BILLINGS, and DAVIS, JJ.

MEMORANDUM DECISION

BILLINGS.

*1 Plaintiff-appellant Tammy Bronson appeals the trial court's grant of summary judgment against her and in favor of defendant-respondent Jones and its denial of Bronson's motion to amend her complaint. We affirm.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Utah R.Civ.P. 56(c). We review a grant of summary judgment for correctness. *See Carter v. Milford Valley Mem'l Hosp.*, 2000 UT App 21, ¶ 12, 996 P.2d 1076.

To establish alienation of affection, Bronson "must prove by clear and convincing evidence that it was the conduct of [Jones] that constituted a controlling cause of the injury to [Bronson's] consortium interests and that [Jones's] conduct was not just incidental to other causative factors that destroyed or damaged the marriage or conjugal relationship." *Norton v. McFarlane,* 818 P.2d 8, 15 (Utah 1991). As explained by the Restatement (Second) of Torts:

> In order for liability to arise for alienation of affections *there must be active and affirmative conduct.* Inaction is not enough to subject a defendant to the liability. There must be some act on the part of the defendant intended to induce or accomplish the results.... It is only when there is such active participation, initiative, or encouragement on the part of the defendant that he or she has in fact played a substantial part in inducing or causing one spouse's loss of the other spouse's affections, that liability arises.

Restatement (Second) of Torts § 683 cmt. g (1977) (emphasis added).

The trial court interpreted *Norton* to require Bronson to identify the existence of efforts to alienate by Jones, aimed directly at Mr. Bronson, which were the controlling cause of the Bronsons' marital discord. It was undisputed that, while Jones had contacted Mrs. Bronson, Jones had not contacted Mr. Bronson in four years, except for one telephone call in 1998. Thus, the court determined that Jones did not actively pursue Mr. Bronson such that Mrs. Bronson could prove by clear and convincing evidence that Jones's conduct toward Mr. Bronson was the controlling cause of the marital discord.

Bronson argues that her affidavit, as well as the affidavits of her sisters-in-law Amy and Tina Bronson, raised material issues of fact with regard to Jones's conduct. However, while these affidavits do address Jones's alleged conduct toward Mrs. Bronson, they do not identify any alienation efforts aimed directly at Mr. Bronson. Thus, the trial court was correct in granting summary judgment in favor of Jones.

Bronson also argues the trial court abused its discretion in denying her motion to amend her complaint to plead invasion of privacy. Under the Utah Rules of Civil Procedure, once responsive

pleadings have been filed, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Utah R.Civ.P. 15(a). "The standard of review of a denial to amend pleadings is abuse of discretion." *Kasco Serv. Corp. v. Benson,* 831 P.2d 86, 91 (Utah 1992).

***2** This court has held that "Utah courts should consider the following factors in determining whether to allow amendment: (1) the timeliness of the motion; (2) the justification for delay; and (3) any resulting prejudice to the responding party." *Atcitty v. Board of Educ.,* 967 P.2d 1261, 1264 (Utah Ct.App.1998) (citing *Swift Stop, Inc. v. Wight,* 845 P.2d 250, 253 (Utah Ct.App.1992)).

We conclude that the trial court did not abuse its discretion in denying Bronson's motion to amend. First, Bronson attempted to set forth new issues in her amended complaint. Second, Bronson filed her motion after Jones had filed her summary judgment motion. Third, we conclude that Bronson was aware of the "new issues" raised in the amended complaint long before her motion was filed, and that there was no justifiable reason for the delay. We therefore affirm the trial court's denial of Bronson's motion to amend her complaint.

JACKSON, A.P.J. and DAVIS, J., concur.

Not Reported in P.3d, 2000 WL 33244137 (Utah App.), 2000 UT App 284

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